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THE ALL INDIA REPORTER

1932

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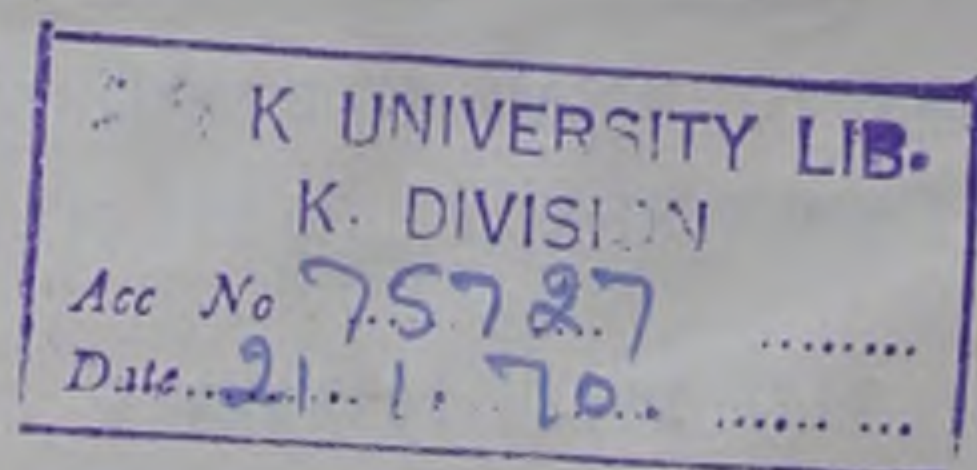
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5/10/72

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52	" "	219	275	" PC	28	557	" "	484	788
53	" "	217	280	" M	169	563	" "	445	793
55	" "	224	282	" "	283	575	" "	378	798
56	" "	482	284	" PC	50	579	" "	491	801
61	" "	321	286	" M	351	584	" PC	69	813
65	" "	214	290	" "	603	589	" M	440	815
72b	" "	223	293	" "	257	597	" "	574	817
75	" "	474	299	1931 notes	22d	610	" "	375	821
87	" "	298	301	1932 M	316	614	" "	516	830
93	" "	284	305	" "	391	618	" PC	138	835
97	" "	302	321	" "	589	623	" M	557	840
100	" PC	22	326	" "	327	632	" "	535	850
105	" M	362	333	1931 PC	229	634	" "	502	856a
106	" "	428	337	1932 M	466	641	" "	678	857
121	" "	390	343	" "	415	644	" "	500	860
125	" "	292	345	" "	325	645	" "	676	864
133	" "	472	350	" "	612	647	" "	563	870
136	1931 PC	303	420	" "	438	649	" "	509	872
142	1932 M	226	423	" "	414	652	1933 "	92	897
144	" "	294	424	" "	320	653	" "	133	902
152	" "	212	425	" "	368	660	1932 PC	55	904
158	" "	310	431	" "	501	664	" M	424	912
160	" "	238	438	" "	453	668	" "	724	918
164	" "	112	442	" "	470	680	" PC	118	923
168	" "	218	445	" PC	74	685	" "	51	946
171	" PC	1	449	" M	431	690	" "	137	949
190	" M	372	451	" "	427	720	" M	508	955
193	" "	305	457	" "	538	722	1933 "	277	959
200	" "	361	461	" "	748	724	1932 "	494	969
202	" "	417	480	" PC	46	726	" "	720	975
204	" "	352	486	" "	92	729	" "	593	979
216	" "	287	494	" M	583	742	" "	566	982
219	" "	313	502	" PC	89	752	" "	435	986

1932 Madras Weekly Notes=All India Reporter—(Concl'd.)

MWN	A. I. R.	MWN	A. I. R.	MWN	A. I. R.	MWN	A. I. R.	MWN	A. I. R.
1187	1933 M 63	1218	1933 M 65	1248	1933 M 22	1296	1933 M 219	1328	1933 M 25 ⁷
1189	" " 73	1220	1932 " 564	1252	" " 114	1298	" " 1	1330	" " 10 ⁴
1191	" " 55	1222	1933 " 278	1260	" " 71	1301	1932 PC 269	1333	" " 157
1197	" " 42	1225	" " 268	1262	" " 5	1311	" M 658	1335	" " 166
1198	" " 83	1230	" " 98	1274	" " 59	1314	1933 " 112	1338	" " 94
1200	" " 33	1233	" " 7	1277	" " 80	1317	" " 197	1340	" " 70
1201	" " 9	1237	1932 PC 279	1282	" " 14	1322	" " 93	1350	" " 99
1203	" " 265	1240	1933 M 105	1287	1932 " 716	1324	" " 108	1357	" " 123
1207	1932 " 757	1244	1932 " 714						

5 Madras Criminal Cases=All India Reporter

NOTE.—The pages of cases not mentioned below are cases either considered not reportable or not sanctioned by the Hon'ble Judges.

MCrC	A. I. R.	MCrC	A. I. R.	MCrC	A. I. R.	MCrC	A. I. R.	MCrC	A. I. R.
1	1932 M 254	75	1932 M 391	181	1932 M 563	230	1933 M 277	349	1933 M 65
5	" " 369	96	" " 290	184	" " 535	265	1932 " 559	351	" " 16
11	" " 271	102	" " 294	187	" " 507	269	" " 720	361	" " 270
16	" " 253	118	" " 748	192	" " 678	273	" " 660	363	" " 67
19	" " 362	140	" " 512	197	" " 502	275	" " 564	365	" " 279
25	" " 428	148	" " 497	209	" " 676	284	" " 561	373	" " 247
34	" " 214	155	" " 533	213	" " 216	289	1933 " 233	382	" " 245
54	" " 505	163	" " 495	216	" " 508	337	" " 67	386	" " 98
59	" " 427	174	" " 431	217	" " 511	341	1932 " 700	397	" " 268
60	" " 494	177	" " 500	220	" " 673	344	" " 675	402	" " 278
64	" " 368	180	" " 501	227	" " 537	346	1933 " 65	408	" " 102

17 & 18 A. I. Cr. R.=All India Reporter

Please refer to COMPARATIVE TABLE No. I in A. I. R. 1932 Allahabad

33 Cr. L. J. & 135 to 140 I. C.=All India Reporter

Please refer to COMPARATIVE TABLE No. I in A. I. R. 1932 Lahore

1932 Cr. C.=All India Reporter

Please refer to COMPARATIVE TABLE No. I in A. I. R. 1932 Nagpur

TABLE No. II

Showing seriatim the pages of ALL INDIA REPORTER, 1932 MADRAS with corresponding references of other REPORTS, JOURNALS, and PERIODICALS.

N. B.—Column No. 1 denotes pages of ALL INDIA REPORTER, 1932 MADRAS.

Column No. 2 denotes corresponding references of other REPORTS and JOURNALS.

A. I. R. 1932 Madras=Other Journals

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
1 (1)	1931 M W N 1207	19	34 M L W 231	25 (2)	33 Cr L J 274	33	135 I C 705
FB	34 M L W 911	21	1931 M W N 1053		136 I C 314		55 Mad 137
	62 M L J 175		4 MCrC 389		18 A I Cr R 15	39	61 M L J 878
	136 I C 346		35 M L W 44	26	61 M L J 848		1931 M W N 755
1 (2)	1931 M W N 667		1932 Cr C 1		1932 Cr C 6		34 M L W 424
	34 M L W 618		136 I C 33		1931 M W N 1058		136 I C 36
	135 I C 710		33 Cr L J 215		34 M L W 727		55 Mad 243
7	61 M L J 520	24	61 M L J 860		4 MCrC 318	41	60 M L J 173
	135 I C 314		1932 Cr C 4		33 Cr L J 270		54 Mad 345
	34 M L W 806		1931 M W N 1138		136 I C 311		134 I C 60
8	61 M L J 462		34 M L W 858		55 Mad 262		33 M L W 149
	1931 M W N 1029		4 MCrC 395		17 A I Cr R 403		1931 M W N 586
	34 M L W 477		33 Cr L J 173	28	62 M L J 39	44	61 M L J 874
	135 I C 897		135 I C 590		1931 M W N 808		1931 M W N 1278
	55 Mad 151		17 A I Cr R 315		35 M L W 134		34 M L W 884
15	61 M L J 552	25 (1)	1932 Cr C 5		135 I C 715		135 I C 580
	1931 M W N 1040		1931 M W N 1137	31	61 M L J 549		55 Mad 292
	34 M L W 730		35 M L W 141		135 I C 8	46	35 M L W 206
	136 I C 203		33 Cr L J 273		34 M L W 548		139 I C 54
18	1931 M W N 891		136 I C 314	32	1931 M W N 487		34 M L W 898
	135 I C 911		4 MCrC 397		35 M L W 142	53	135 I C 619
19	134 I C 59		17 A I Cr R 479		135 I C 910		62 M L J 107
	61 M L J 541	25 (2)	1931 Cr C 5	33	61 M L J 479		1931 M W N 1266
	54 Mad 852		1931 M W N 1050		1931 M W N 798	55	55 Mad 391
	1932 Cr C 1		35 M L W 140		34 M L W 448		

A. I. R. 1932 Madras=Other Journals—(Contd.)

A.I.R. Other Journals		A.I.R. Other Journals		A.I.R. Other Journals		A.I.R. Other Journals	
55	35 M L W 831	120	1931 M W N 1257	160	62 M L J 662	213	34 M L W 896
	138 I C 426		34 M L W 967	162	61 M L J 714		135 I C 622
63	61 M L J 719		62 M L J 131		34 M L W 684		1932 Cr C 155
	1931 M W N 924		135 I C 573		135 I C 742		33 Cr L J 192
	34 M L W 735	125	61 M L J 692		55 Mad 313	214	35 M L W 61
	135 I C 750		34 M L W 817		1932 M W N 552		1932 M W N 65
66	61 M L J 763		135 I C 449	163	34 M L W 919		62 M L J 223
	1931 M W N 1131		55 Mad 106		136 I C 315		1932 Cr C 156
	34 M L W 788	129	61 M L J 684	164	61 M L J 894		5 M Cr C 34
	135 I C 739		1931 M W N 1047		1931 M W N 1204		138 I C 133
70	61 M L J 852		34 M L W 841		34 M L W 989		33 Cr L J 557
	34 M L W 786		1932 Cr C 109		136 I C 769		18 A I Cr R 271
	136 I C 776		136 I C 48	167	34 M L W 849	216	33 Cr L J 362
71	134 I C 1211		17 A I Cr R 395		1931 M W N 1253		136 I C 780
	34 M L W 669		33 Cr L J 218		62 M L J 103		35 M L W 267
73	62 M L J 1	130	61 M L J 686		135 I C 585		1931 M W N 1191
FB	1931 M W N 1209		1931 M W N 1048		55 Mad 385		1932 Cr C 158
	34 M L W 866		34 M L W 629	169	61 M L J 863		5 M Cr C 213
	135 I C 561		4 M Cr C 349		34 M L W 906	217	35 M L W 64
	55 Mad 352		1932 Cr C 109		1932 M W N 280		1932 M W N 53
84	61 M L J 857		33 Cr L J 272		136 I C 337		138 I C 136
	34 M L W 715		136 I C 313	170	61 M L J 688	218	35 M L W 145
	136 I C 305		17 A I Cr R 464		1931 M W N 1124		1932 M W N 168
86	1931 M W N 1235	131	61 M L J 148		34 M L W 783		137 I C 285
	34 M L W 809	FB	134 I C 33		136 I C 45	219	1932 M W N 52
	62 M L J 302		32 Cr L J 1085	171	1931 M W N 1118		138 I C 62
	136 I C 306		54 Mad 857		34 M L W 903	220	62 M L J 111
	55 Mad 495		34 M L W 19		62 M L J 263		35 M L W 338
90	1931 M W N 994	139	61 M L J 675		136 I C 319		55 Mad 171
	34 M L W 697		1931 M W N 1127	173	136 I C 783		141 I C 680
	62 M L J 77		34 M L W 650	175	1931 M W N 751	223	35 M L W 57
	135 I C 452		135 I C 587		136 I C 785		1932 M W N 72
	55 Mad 298		55 Mad 286	177	1931 M W N 965		138 I C 121
95	1931 M W N 1251	141	34 M L W 921		61 M L J 507	224	1932 M W N 55
	34 M L W 908		136 I C 317		34 M L W 551		35 M L W 144
	62 M L J 68	142	61 M L J 710		134 I C 810		137 I C 564
	136 I C 338		34 M L W 795		55 Mad 216	225	35 M L W 68
	55 Mad 316		135 I C 737	180	35 M L W 168		1932 M W N 51
97 (1)	61 M L J 399	144	34 M L W 704		136 I C 346		138 I C 119
	134 I C 188		135 I C 457	182	34 M L W 949	226	35 M L W 70
	54 Mad 821		55 Mad 202		135 I C 582		1932 M W N 142
	34 M L W 933	146	61 M L J 638	185	35 M L W 253		139 I C 620
97 (2)	1931 M W N 969		135 I C 16		1931 M W N 1282	227	1932 M W N 23
	136 I C 43		34 M L W 712		136 I C 773		35 M L W 182
100	61 M L J 724	148	34 M L W 663	188	34 M L W 912		62 M L J 187
	34 M L W 746		135 I C 532		136 I C 318		138 I C 170
	136 I C 193	151	1931 M W N 1231	189	1931 M W N 1197		55 Mad 581
108	61 M L J 862		34 M L W 859		34 M L W 889	233	35 M L W 66
	1931 M W N 764		135 I C 590		62 M L J 31		62 M L J 177
	34 M L W 848	154	34 M L W 804		135 I C 609		138 I C 31
	135 I C 912		136 I C 337		55 Mad 468	234	1932 M W N 9
	55 Mad 201	155 (1)	1931 M W N 1148	193	61 M L J 904		35 M L W 156
109	1931 M W N 1226		136 I C 316		35 M L W 22		62 M L J 180
	34 M L W 843	155 (2)	34 M L W 961		136 I C 771		138 I C 74
	62 M L J 266		135 I C 578	196	61 M L J 512		55 Mad 549
	135 I C 907		62 M L J 93		34 M L W 772	237	35 M L W 148
	55 Mad 458		55 Mad 332		135 I C 316		62 M L J 234
112	61 M L J 544		1932 M W N 554	198	1932 M W N 31		137 I C 390
	34 M L W 799	157	61 M L J 761		35 M L W 73	238	1932 M W N 160
	135 I C 613		1931 M W N 961		62 M L J 116		35 M L W 429
	1932 M W N 164		34 M L W 725		55 Mad 40		138 I C 329
115	1931 M W N 1141		136 I C 207		139 I C 684	241	1931 M W N 624
	34 M L W 635	158	34 M L W 837	207	1931 M W N 1323		61 M L J 388
	62 M L J 272		1932 M W N 14		35 M L W 35		34 M L W 643
	135 I C 535		62 M L J 150		55 Mad 483		134 I C 977
	55 Mad 320		135 I C 747		137 I C 616	245	1931 M W N 1246
119	61 M L J 683		55 Mad 336		35 M L W 105		35 M L W 424
	1931 M W N 1162	160	1931 M W N 1321	212	1932 M W N 152		138 I C 340
	34 M L W 708		35 M L W 28		137 I C 319	247	1932 M W N 3
	136 I C 47		136 I C 201		1931 M W N 1192		35 M L W 150
	55 Mad 205		55 Mad 282	213			

A. I. R. 1932 Madras=Other Journals—(Contd.)

A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals
247	62 M L J 281	287	136 I C 822	321	137 I C 868	369FB18	A I Cr R 154
	137 I C 622	FB	55 Mad 630	323	62 M L J 239	371	55 Mad 90
	55 Mad 541	289	62 M L J 598		35 M L W 269		1931 M W N 494
250	35 M L W 161		35 M L W 356		137 I C 838		34 M L W 92
	137 I C 394		137 I C 496	325	1932 M W N 345		4 M Cr C 206
253	1931 M W N 1314	290	62 M L J 310		62 M L J 387		134 I C 187
	35 M L W 180		35 M L W 319		35 M L W 405		32 Cr L J 1131
	5 M Cr C 16		5 M Cr C 96		138 I C 526		61 M L J 987
	1932 Cr C 182		1932 M W N 241		55 Mad 594		1932 Cr C 354
	55 Mad 343		1932 Cr C 276	327	1932 M W N 326	372	1932 M W N 190
	33 Cr L J 361		55 Mad 531		137 I C 715	FB	62 M L J 562
	136 I C 779		139 I C 482	328	1931 M W N 1287		137 I C 28
	62 M L J 735		17 A I Cr R 421		35 M L W 191		35 M L W 538
254	1931 M W N 1305		33 Cr L J 788		137 I C 487		55 Mad 720
	35 M L W 176	292	1932 M W N 125		62 M L J 496	375	62 M L J 638
	5 M Cr C 1		35 M L W 230	336	62 M L J 439	SB	1932 M W N 610
	62 M L J 230		62 M L J 259		137 I C 369		137 I C 689
	1932 Cr C 184		137 I C 585		55 Mad 671		35 M L W 806
	136 I C 348	294	1932 M W N 144		35 M L W 520		55 Mad 818
	33 Cr L J 307		35 M L W 366	343	1932 M W N 264	377	1932 M W N 1
	55 Mad 346		1932 Cr C 280		35 M L W 498	FB	62 M L J 592
	18 A I Cr R 56		5 M Cr C 102		62 M L J 511		137 I C 30
256	1932 M W N 8		138 I C 354		138 I C 40		55 Mad 453
	35 M L W 166		33 Cr L J 605	351	1932 M W N 286		35 M L W 516
	62 M L J 185		62 M L J 392		62 M L J 433	378	62 M L J 600
	1932 Cr C 290	298	1932 M W N 87		137 I C 749	SB	35 M L W 735
	55 Mad 455		35 M L W 288		35 M L W 513		1932 M W N 575
	137 I C 571		62 M L J 313		55 Mad 752		138 I C 1
257	35 M L W 93		138 I C 34	352	1932 M W N 204		55 Mad 891
	1932 M W N 293		55 Mad 601		137 I C 740	381	35 M L W 592
	137 I C 400	301	35 M L W 264		63 M L J 152		63 M L J 37
260	1931 M W N 842		138 I C 494		35 M L W 544		138 I C 225
	34 M L W 271		1932 M W N 872		55 Mad 766		55 Mad 553
	61 M L J 307	302	1932 M W N 97	361	35 M L W 475	390	1932 M W N 121
	137 I C 183		62 M L J 236		1932 M W N 200	FB	62 M L J 533
263	61 M L J 477		35 M L W 276		62 M L J 436		137 I C 26
	34 M L W 864		137 I C 879		137 I C 765		55 Mad 627
	136 I C 42		55 Mad 748		55 Mad 577		35 M L W 518
264	34 M L W 765	303	35 M L W 171	362	1932 M W N 105	391	1932 Cr C 355
	62 M L J 96		136 I C 350		5 M Cr C 19	FB	62 M L J 742
	135 I C 616	305	1932 M W N 193		62 M L J 197		35 M L W 705
	1932 M W N 249		35 M L W 307		35 M L W 265		5 M Cr C 75
267	34 M L W 776		55 Mad 519		1932 Cr C 295		137 I C 9
	61 M L J 887		62 M L J 525		137 I C 754		1932 M W N 305
	136 I C 340		138 I C 78		33 Cr L J 522		33 Cr L J 418
271	1931 M W N 1308	310 (1)	35 M L W 348		55 Mad 788		18 A I Cr R 66
	5 M Cr C 11		137 I C 510		18 A I Cr R 269		55 Mad 903
	1932 Cr C 211		1932 M W N 1062	363	1930 M W N 1130	408	35 M L W 611
	35 M L W 316	310 (2)	1932 M W N 158	FB	4 M Cr C 266		138 I C 237
	62 M L J 343		35 M L W 388		62 M L J 425	409	35 M L W 393
	55 Mad 432		62 M L J 399		35 M L W 481		138 I C 88
	33 Cr L J 363		138 I C 362		137 I C 312	410	62 M L J 472
	136 I C 781	311	35 M L W 294		1932 Cr C 329		35 M L W 673
272	1931 M W N 1242		1932 M W N 226		33 Cr L J 479		55 Mad 646
	35 M L W 233		55 Mad 507		55 Mad 611		141 I C 752
	136 I C 343		63 M L J 77		18 A I Cr R 179	414	1932 M W N 423
275	1931 M W N 1329		139 I C 404	368	5 M Cr C 64		137 I C 792
	35 M L W 322	316	1932 M W N 301		35 M L W 390		36 M L W 422
	62 M L J 350		137 I C 842		1932 M W N 425	415	1932 M W N 343
	136 I C 850	318	35 M L W 272		1932 Cr C 334		35 M L W 511
283	35 M L W 257		1932 M W N 219		138 I C 68	416	35 M L W 449
	1932 M W N 282		62 M L J 346		33 Cr L J 536		137 I C 320
	138 I C 819		138 I C 509		18 A I Cr R 317	417	1932 M W N 202
284	1932 M W N 93	320	136 I C 781	369	33 Cr L J 454		35 M L W 395
	62 M L J 226		33 Cr L J 364	FB	1931 M W N 1149		137 I C 799
	137 I C 636		35 M L W 315		5 M Cr C 5	418	1932 M W N 255
	35 M L W 302		1932 Cr C 312		62 M L J 469	SB	62 M L J 687
	55 Mad 704		1932 M W N 424		35 M L W 478		35 M L W 742
287	62 M L J 256	321	1932 M W N 61		1932 Cr C 353		137 I C 305
FB	35 M L W 260		35 M L W 360		137 I C 317		55 Mad 801
	1932 M W N 216		62 M L J 644		55 Mad 622	424SB62	M L J 656

A. I. R. 1932 Madras=Other Journals—(Contd.)

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
424	1932M W N 664	453	55 Mad 664	500	62 M L J 680	523	36 M L W 93
SB	137 I C 557	456	62 M L J 622		1932M W N 644		139 I C 652
	35 M L W 777		35 M L W 609		1932Cr C 504		55 Mad 982
427	5 M Cr C 59		1932M W N 528		138 I C 240	527	36 M L W 169
	35 M L W 451		138 I C 233		5 M Cr C 177		139 I C 574
	1932M W N 451		55 Mad 701		55 Mad 717	528	1932M W N 870
	137 I C 333	457	1932M W N 44		33 Cr L J 586		140 I C 77
	1932Cr C 408		62 M L J 533	501	1932M W N 431	529	1932M W N 524
	33 Cr L J 452		35 M L W 490		1932Cr C 505		36 M L W 122
	18 A I Cr R 231		55 Mad 436		5 M Cr C 180		138 I C 390
428	1932M W N 106		139 I C 135		138 I C 383		63 M L J 282
	5 M Cr C 25	459	140 I C 463		33 Cr L J 598		55 Mad 942
	62 M L J 632	462	1932M W N 234		36 M L W 407	532	36 M L W 408
	35 M L W 625		62 M L J 550	502	1932M W N 634		140 I C 28
	1932Cr C 409		35 M L W 565		1932Cr C 506	535	1932M W N 632
	138 I C 126		55 Mad 689		5 M Cr C 197		5 M Cr C 184
	33 Cr L J 539		139 I C 877		63 M L J 101		138 I C 488
	18 A I Cr R 291	466	1932M W N 337		36 M L W 390		1932Cr C 552
431	62 M L J 559		35 M L W 631		139 I C 343		33 Cr L J 626
	1932M W N 449		137 I C 651		33 Cr L J 765		36 M L W 426
	137 I C 863		63 M L J 672	505	1932M W N 244	537	1932Cr C 525
	1932Cr C 412	470	1932M W N 442		5 M Cr C 54		138 I C 491
	5 M Cr C 174		62 M L J 594		35 M L W 760		1932M W N 860
	33 Cr L J 526		137 I C 758		62 M L J 738		5 M Cr C 227
	55 Mad 711		35 M L W 588		1932Cr C 509		33 Cr L J 629
	35 M L W 542		55 Mad 636		138 I C 581		36 M L W 429
	18 A I Cr R 286	472	1932M W N 133		33 Cr L J 653	538	63 M L J 142
432	35 M L W 392		138 I C 146		55 Mad 795		138 I C 548
	138 I C 84	474	1932M W N 75	507	1932M W N 545		1932Cr C 566
433	138 I C 290		35 M L W 573		1932Cr C 511		33 Cr L J 622
SB	1932M W N 762		62 M L J 720		5 M Cr C 187		36 M L W 402
	36 M L W 20		138 I C 12		138 I C 286		55 Mad 1041
	63 M L J 236	482	1932M W N 56		36 M L W 127		1932M W N 457
	55 Mad 827		62 M L J 629		33 Cr L J 582		5 M Cr C 155
434	63 M L J 15		35 M L W 614	508	1932Cr C 512	541	139 I C 197
SB	1932M W N 754		138 I C 114		5 M Cr C 216		36 M L W 388
	138 I C 485		55 Mad 656		1932M W N 720		1932M W N 1169
	36 M L W 12	484	1932M W N 557		138 I C 583	542	139 I C 670
	55 Mad 832		62 M L J 665		33 Cr L J 655	545	62 M L J 573
435	63 M L J 22		35 M L W 679	509	1932M W N 649		1932M W N 506
SB	138 I C 301		138 I C 668		138 I C 600		35 M L W 687
	36 M L W 26		55 Mad 835		36 M L W 117		137 I C 884
	1932M W N 752	489	35 M L W 756		63 M L J 148	554	140 I C 92
	55 Mad 885		138 I C 276		55 Mad 848		
436	63 M L J 20		63 M L J 107	511	35 M L W 753	557	1932M W N 623
SB	138 I C 289		1932M W N 798		1932Cr C 515		36 M L W 476
	35 M L W 17	491	1932M W N 579		138 I C 604		138 I C 786
	55 Mad 830		62 M L J 712		5 M Cr C 217	559	1932Cr C 589
437	63 M L J 11		35 M L W 798		63 M L J 380		37 M L W 134
SB	138 I C 273		138 I C 303		33 Cr L J 665		1932M W N 857
	1932M W N 756	494	5 M Cr C 60		1932M W N 1086		139 I C 203
	36 M L W 40		62 M L J 717		55 Mad 791		33 Cr L J 738
438	62 M L J 541		55 Mad 536	512	62 M L J 571		5 M Cr C 265
	1932M W N 420		137 I C 761		5 M Cr C 140	560	138 I C 459
	35 M L W 618		35 M L W 803		1932Cr C 430		1932M W N 856
	55 Mad 641		1932Cr C 469		35 M L W 671	561	138 I C 518
	139 I C 131		1932M W N 724		137 I C 810		1932Cr C 660
440	35 M L W 638		33 Cr L J 519		33 Cr L J 533		36 M L W 237
	1932M W N 589		18 A I Cr R 328		55 Mad 715		33 Cr L J 647
	62 M L J 698	495	5 M Cr C 163		18 A I Cr R 299		5 M Cr C 284
	137 I C 645		1932Cr C 470	513	36 M L W 219		1932M W N 1082
	55 Mad 856		1932M W N 813		140 I C 674		18 A I Cr R 367
445	62 M L J 608		139 I C 340	516	1932M W N 614	563	1932M W N 647
	35 M L W 647		33 Cr L J 783		138 I C 632		5 M Cr C 181
	1932M W N 563	497	35 M L W 661		63 M L J 111		138 I C 288
	55 Mad 727		5 M Cr C 148		36 M L W 44		1932Cr C 662
	140 I C 422		33 Cr L J 589		55 Mad 758		36 M L W 379
453	1932M W N 438		138 I C 317	519	36 M L W 414		33 Cr L J 579
	62 M L J 624		1932Cr C 501		139 I C 761	564	138 I C 378
	35 M L W 621		1932M W N 1157	523	1932M W N 537		1932Cr C 663
	138 I C 218	500	35 M L W 607		63 M L J 28		33 Cr L J 601

A. I. R. 1932 Madras=Other Journals—(Concl'd.)

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
564	5 <i>M Cr C</i> 275 1932 <i>M W N</i> 1220	664	63 <i>M L J</i> 249 36 <i>M L W</i> 204 1932 <i>M W N</i> 1007	688	36 <i>M L W</i> 378 139 <i>I C</i> 679	731	63 <i>M L J</i> 414 139 <i>I C</i> 574 1932 <i>M W N</i> 1105
565	35 <i>M L W</i> 358 137 <i>I C</i> 871		139 <i>I C</i> 426	689	35 <i>M L W</i> 444 137 <i>I C</i> 458		36 <i>M L W</i> 655
566	1932 <i>M W N</i> 742 63 <i>M L J</i> 394 36 <i>M L W</i> 253 139 <i>I C</i> 309	667	55 <i>Mad</i> 876 63 <i>M L J</i> 73 1932 <i>M W N</i> 777 36 <i>M L W</i> 191 139 <i>I C</i> 102	692	1932 <i>M W N</i> 975 35 <i>M L W</i> 336 1932 <i>M W N</i> 232 62 <i>M L J</i> 403 55 <i>Mad</i> 661	733 SB	63 <i>M L J</i> 542 36 <i>M L W</i> 536 1932 <i>M W N</i> 1139 140 <i>I C</i> 17 56 <i>Mad</i> 1
573 SB	63 <i>M L J</i> 227 36 <i>M L W</i> 165 139 <i>I C</i> 173 1932 <i>M W N</i> 902	669	36 <i>M L W</i> 242 63 <i>M L J</i> 357 1932 <i>M W N</i> 1124 139 <i>I C</i> 436 55 <i>Mad</i> 871	693	139 <i>I C</i> 364 1932 <i>M W N</i> 793 63 <i>M L J</i> 303 139 <i>I C</i> 486 36 <i>M L W</i> 470	734	1932 <i>M W N</i> 897 63 <i>M L J</i> 587 36 <i>M L W</i> 626 139 <i>I C</i> 870
574	1932 <i>M W N</i> 597 36 <i>M L W</i> 170 139 <i>I C</i> 409 55 <i>Mad</i> 1006 63 <i>M L J</i> 827	671	1932 <i>M W N</i> 780 36 <i>M L W</i> 483 139 <i>I C</i> 471	696	139 <i>I C</i> 517 35 <i>M L W</i> 849 138 <i>I C</i> 877 33 <i>Cr L J</i> 704 5 <i>M Cr C</i> 341	737	36 <i>M L W</i> 424 139 <i>I C</i> 431 1932 <i>M W N</i> 986 55 <i>Mad</i> 994 63 <i>M L J</i> 949 37 <i>M L W</i> 49 1932 <i>M W N</i> 767
583	62 <i>M L J</i> 154 35 <i>M L W</i> 279 1932 <i>M W N</i> 494 137 <i>I C</i> 274	673	1932 <i>M W N</i> 548 5 <i>M Cr C</i> 220 139 <i>I C</i> 500 33 <i>Cr L J</i> 785 36 <i>M L W</i> 788	700	1932 <i>M W N</i> 835 36 <i>M L W</i> 498 63 <i>M L J</i> 568 55 <i>Mad</i> 966 141 <i>I C</i> 660	739	139 <i>I C</i> 355 36 <i>M L W</i> 486 63 <i>M L J</i> 610 1932 <i>M W N</i> 988 1932 <i>M W N</i> 461 5 <i>M Cr C</i> 118 139 <i>I C</i> 725 33 <i>Cr L J</i> 814 36 <i>M L W</i> 798 1932 <i>Cr C</i> 923 56 <i>Mad</i> 63 64 <i>M L J</i> 153 63 <i>M L J</i> 634 1932 <i>M W N</i> 1207 36 <i>M L W</i> 719 140 <i>I C</i> 450 1932 <i>M W N</i> 850 36 <i>M L W</i> 186 139 <i>I C</i> 766 63 <i>M L J</i> 548 36 <i>M L W</i> 599 1932 <i>M W N</i> 1171 140 <i>I C</i> 315 63 <i>M L J</i> 310 139 <i>I C</i> 449 1932 <i>M W N</i> 1052 37 <i>M L W</i> 214 36 <i>M L W</i> 543 1932 <i>M W N</i> 1127 140 <i>I C</i> 83 63 <i>M L J</i> 743 36 <i>M L W</i> 833 63 <i>M L J</i> 868 1932 <i>M W N</i> 1017 141 <i>I C</i> 241
588	140 <i>I C</i> 11		36 <i>M L W</i> 788		1932 <i>Cr C</i> 828	745	
589	35 <i>M L W</i> 350 1932 <i>M W N</i> 321 137 <i>I C</i> 707	675	36 <i>M L W</i> 208 139 <i>I C</i> 435 1932 <i>M W N</i> 1077 5 <i>M Cr C</i> 344 33 <i>Cr L J</i> 769 1932 <i>Cr C</i> 833	701	35 <i>M L W</i> 452 137 <i>I C</i> 450 1932 <i>M W N</i> 835 36 <i>M L W</i> 498 63 <i>M L J</i> 568 55 <i>Mad</i> 966 141 <i>I C</i> 660	748	
593	1932 <i>M W N</i> 729 63 <i>M L J</i> 254 139 <i>I C</i> 418 36 <i>M L W</i> 673 56 <i>Mad</i> 40		1932 <i>M W N</i> 645 5 <i>M Cr C</i> 209 138 <i>I C</i> 608 33 <i>Cr L J</i> 655 37 <i>M L W</i> 149 1932 <i>Cr C</i> 834	705	1932 <i>M W N</i> 1244 139 <i>I C</i> 452 1932 <i>M W N</i> 1287 1932 <i>M W N</i> 726 5 <i>M Cr C</i> 269 36 <i>M L W</i> 461 63 <i>M L J</i> 594 139 <i>I C</i> 773 33 <i>Cr L J</i> 826 1932 <i>M W N</i> 949 139 <i>I C</i> 457 36 <i>M L W</i> 604 55 <i>Mad</i> 975 63 <i>M L J</i> 845 1932 <i>M W N</i> 668 139 <i>I C</i> 510 63 <i>M L J</i> 577 36 <i>M L W</i> 569 1932 <i>M W N</i> 1057 63 <i>M L J</i> 575 36 <i>M L W</i> 579 139 <i>I C</i> 833	749	
601	35 <i>M L W</i> 495 137 <i>I C</i> 829	676	1932 <i>M W N</i> 645 5 <i>M Cr C</i> 209 138 <i>I C</i> 608 33 <i>Cr L J</i> 655 37 <i>M L W</i> 149 1932 <i>Cr C</i> 834	709	1932 <i>M W N</i> 529 36 <i>M L W</i> 195 139 <i>I C</i> 444 139 <i>I C</i> 167 36 <i>M L W</i> 646 1932 <i>M W N</i> 1244 139 <i>I C</i> 452 1932 <i>M W N</i> 1287 1932 <i>M W N</i> 726 5 <i>M Cr C</i> 269 36 <i>M L W</i> 461 63 <i>M L J</i> 594 139 <i>I C</i> 773 33 <i>Cr L J</i> 826 1932 <i>M W N</i> 949 139 <i>I C</i> 457 36 <i>M L W</i> 604 55 <i>Mad</i> 975 63 <i>M L J</i> 845 1932 <i>M W N</i> 668 139 <i>I C</i> 510 63 <i>M L J</i> 577 36 <i>M L W</i> 569 1932 <i>M W N</i> 1057 63 <i>M L J</i> 575 36 <i>M L W</i> 579 139 <i>I C</i> 833	757 SB	
603	1932 <i>M W N</i> 290 141 <i>I C</i> 420		139 <i>I C</i> 473 33 <i>Cr L J</i> 790 36 <i>M L W</i> 620 1932 <i>Cr C</i> 836 63 <i>M L J</i> 242 139 <i>I C</i> 188 36 <i>M L W</i> 396 1932 <i>M W N</i> 1002 1932 <i>M W N</i> 763 139 <i>I C</i> 477 36 <i>M L W</i> 479 63 <i>M L J</i> 689 55 <i>Mad</i> 960 63 <i>M L J</i> 232 1932 <i>M W N</i> 918 139 <i>I C</i> 164 36 <i>M L W</i> 514 36 <i>M L W</i> 432 139 <i>I C</i> 361	714			
605	36 <i>M L W</i> 225 139 <i>I C</i> 317 1932 <i>M W N</i> 992 63 <i>M L J</i> 764	678	5 <i>M Cr C</i> 192 139 <i>I C</i> 473 33 <i>Cr L J</i> 790 36 <i>M L W</i> 620 1932 <i>Cr C</i> 836 63 <i>M L J</i> 242 139 <i>I C</i> 188 36 <i>M L W</i> 396 1932 <i>M W N</i> 1002 1932 <i>M W N</i> 763 139 <i>I C</i> 477 36 <i>M L W</i> 479 63 <i>M L J</i> 689 55 <i>Mad</i> 960 63 <i>M L J</i> 232 1932 <i>M W N</i> 918 139 <i>I C</i> 164 36 <i>M L W</i> 514 36 <i>M L W</i> 432 139 <i>I C</i> 361	716			
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656	35 <i>M L W</i> 846 1932 <i>M W N</i> 979 139 <i>I C</i> 105	683	1932 <i>M W N</i> 763 139 <i>I C</i> 477 36 <i>M L W</i> 479 63 <i>M L J</i> 689 55 <i>Mad</i> 960 63 <i>M L J</i> 232 1932 <i>M W N</i> 918 139 <i>I C</i> 164 36 <i>M L W</i> 514 36 <i>M L W</i> 432 139 <i>I C</i> 361	722			
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660	138 <i>I C</i> 370 1932 <i>M W N</i> 815 33 <i>Cr L J</i> 603 1932 <i>Cr C</i> 742 5 <i>M Cr C</i> 273	685	1932 <i>M W N</i> 918 139 <i>I C</i> 164 36 <i>M L W</i> 514 36 <i>M L W</i> 432 139 <i>I C</i> 361	729			
661	62 <i>M L J</i> 566 35 <i>M L W</i> 763 138 <i>I C</i> 648	687	36 <i>M L W</i> 432 139 <i>I C</i> 361				

LIST OF CASES OVERRULED AND REVERSED.

Brahmayya v. Pappasetty, (1928) 51 Mad. 695=27 M.L.W. 420=1928 M. W. N. 316=55 M. L. J. 33=A. I. R. 1928 Mad. 499=110 I. C. 114.	Overruled in A.I.R. 1932 Mad. 377 (F.B.).
Palaniappa Chettiar v. Valliammai Achi, (1927) 50 Mad. 1=51 M. L. J. 755=1926 M. W. N. 981=25 M. L. W. 254=A. I. R. 1927 Mad. 184=99 I. C. 627.	" in A.I.R. 1932 Mad. 73 (F.B.).
Seeni Nadan v. Muthuswamy Pillai, (1919) 42 Mad. 821=A. I. R. 1920 Mad. 427=37 M. L. J. 284=26 M. L. T. 223=1919 M. W. N. 640=11 M. L. W. 63=53 I. C. 213, (F.B.).	" in A.I.R. 1932 Mad. 418 (S.B.).
Venkatappayya v. Venkatachalapathi Rao, (1927) 99 I. C. 989=A. I. R. 1927 Mad. 450.	Reversed in A.I.R. 1932 Mad. 86.

THE ALL INDIA REPORTER 1932

MADRAS HIGH COURT

A. I. R. 1932 Madras 1 (1)

Full Bench

**MADHAVAN NAIR, JACKSON AND
CURGENVEN, JJ.**

Municipal Council, Conjeevaram—De-
fendant—Petitioner.

v.

Kashi Munuswami Mudaliar — Plain-
tiff—Respondent.

Civil Revn. Petn. No. 880 of 1930, De-
cided on 2nd September 1931, against
order of Dist. Munsif of Conjeevaram,
D/- 16th December 1929, in S. C. S. No.
558 of 1929.

**Madras District Municipalities Act (1920),
S. 80** — Notification not mentioning specific
rate and calling for objections does not give
jurisdiction to levy tax.

Notification not mentioning specific rate
leviable but calling for objections is not the
notification contemplated by S. 80 and Muni-
cipality has no jurisdiction to levy the tax :
A. I. R. 1928 Mad. 569, Ref. [P 1 C 1]

*V. S. Narasimhachari and K. Subba
Rao*—for Petitioner.

*S. Panchapagasa Sastri and K. R.
Krishnaswami Ayyar*—for Respondent.

Madhavan Nair, J.—In this case we
are of opinion that the Municipality had
no jurisdiction to levy the tax in question
since the notification contemplated by
S. 80, District Municipalities Act, has
not been published by the Municipality.
Under this section a notification specify-
ing the rate at which the tax will be
levied will have to be published before
levying the tax. In the notification, Ex.
2, in this case no specific rate leviable is
mentioned. On the other hand it calls
for objections. We therefore agree with
the lower Court in holding that Ex. 2
cannot be treated as the final notification
contemplated by S. 80.

1932 M/1 & 2

As the Municipality had no jurisdic-
tion to levy the tax, the other question
raised with reference to the correctness
of the decision in the *Madura, etc., Devas-
thanams v. Madura Municipal Coun-
cil* (1) does not arise for consideration.

The civil revision petition is dismissed
with costs.

P.R.S/V.B.

Revision dismissed.

(1) *A. I. R. 1928 Mad. 569=110 I.O. 89=51
Mad. 301.*

*** * A. I. R. 1932 Madras 1 (2)**

MADHAVAN NAIR, J.

(Mantrala) Yegnanarayana — Plaintiff
—Appellant.

v.

*Vankamamidi Yagannadha Rao and
others*—Defendants—Respondents.

Second Appeal No. 2209 of 1927, Deci-
ded on 23rd March 1931, against decree of
Dist. Judge, Kistna, in A. S. No. 64 of
1926.

**** Contribution—Joint tortfeasors** — Per-
son knowing act to be unlawful bringing
about commission of such act is not entitled
to contribution against liability resulting
from his action—Express agreement to in-
demnify him for commission of such act is
void—Contract Act (1872), S. 23.

Where the doer of the act knows that the act
he commits to be unlawful as constituting a
civil wrong or a criminal offence and then deli-
berately brings about the commission of such an
act, the doer is not entitled to contribution
against the liability resulting from his action.
An express agreement to indemnify him for the
commission of such an act is void. [P 5 C 1]

D agreed to sell some lands to V. P knowing
that there was a contract between D and V pre-
vailed upon D to sell the lands to him as he was
prepared to pay him a higher price and also to
fight out the matter with V. V brought a suit
for specific performance of the agreement to sell
the lands in his favour making both D and P
defendants to the suit. D did not contest the
litigation and it was carried on solely by P. V

obtained a decree in the suit and subsequently *P* sued both *D* and *V* to recover the amount of costs which he had incurred in the previous suit, viz., the money he had to spend as well as the money he had to pay *V* in that suit as costs.

Held: that *P*'s interference in procuring a breach of the contract between *D* and *V* was a tort and was actionable. [P 3 C 2]

Held further: that to allow *P* to claim contribution from *D* for his costs incurred in the previous litigation would be unjust and unreasonable and that *P* could not be allowed the same: *Adamson v. Jarvies* (1826) 4 Bing. 66; *Burrows v. Rhodeo & Jameson* (1899), 1 Q.B. 816; *Weld Blundell v. Stephens* (1920), A. C. 956; *W. H. Smith & Son v. Clinton & Harris*, (1908) 99 L. T. 840 and 4 Pat. L. J. 486, *Rel. on.* (Other case law referred.) [P 5 C 2; P 6 C 1]

P. Somasundaram—for Appellant.

G. Lakshmanan—for Respondents.

Judgment.—The plaintiff is the appellant. The facts that need be stated for deciding the questions arising in this second appeal, are briefly these: Defendant 1 had agreed in 1920 to sell some lands which he had in Chinnattumidi Agraharam to his brother Venkataramayya, who was cultivating them, for Rs. 1,800. In the same year he executed an agreement, Ex. B, to sell the same lands to the plaintiff; and afterwards executed in his favour a sale deed, Ex. A, for Rs. 3,500. After the sale deed was executed defendant 1's brother Venkataramayya brought a suit, O. S. No. 23 of 1921, in the Court of the District Munsif of Gudivada for specific performance of the agreement to sell the lands in his favour to which defendant 1 and the plaintiff were made parties. Defendant 1 did not contest that litigation and it was carried on solely by the plaintiff. That suit was decreed in favour of Venkataramayya and the decree was confirmed in appeal also. In the suit, which has given rise to this second appeal, the plaintiff sued to recover the amount of consideration which he has paid to defendant 1 for Ex. A as well as the costs which he incurred in the Gudivada Court, viz., the costs which he had to incur himself in defending the suit and also the costs which he had to pay the plaintiff in that suit. He also asked for damages. The learned Subordinate Judge found that the agreement to sell in favour of the plaintiff was brought into existence during the trial of the suit in the District Munsif's Court of Gudivada, that only a sum of Rs. 1,600 was paid by the plaintiff to defendant 1 and that as he was a joint tortfeasor with defen-

dant 1 he is not entitled to get either the costs or the damages which he has claimed. In the result, the plaintiff was given a decree only for Rs. 1,600 with interest.

Disregarding the issues relating to the minor points raised in the case, the important issues with reference to the findings in which arguments were addressed to me on behalf of the appellant are these:

1-a. Did the plaintiff purchase plaintiff property from defendants with knowledge of the prior agreement to sell in favour of defendant 1's brother Venkataramayya and with an undertaking to risk the consequences of the litigation, if any, with him (Venkataramayya) as alleged by defendants 1 and 2?

5-a. Is plaintiff entitled to claim from defendants 1 and 2 costs he had to incur and costs he had to pay Venkataramayya in the litigation referred to in the plaint; and if so, are the amounts shown in the plaint account correct?

7. Are plaintiff and defendant 1 joint tortfeasors as alleged by defendants; and if so, is not this suit maintainable by the plaintiff?"

These issues were all found against the plaintiff. On these issues the findings of the learned Sub-Judge, generally stated, are that defendant 1 told the plaintiff of his agreement to sell the lands to his brother, that he knowing of this agreement prevailed upon defendant 1 to sell the lands to him at an enhanced price and that defendant 1 was tempted to sell the lands to the plaintiff as he was prepared to pay him a higher price and also to fight out the matter with his brother. The learned Judge also found that the plaintiff alone was responsible for the litigation in the Gudivada Court and that he was a wrongdoer. On issue 7 his finding is:

"I have no doubt that the plaintiff and defendant 1 colluded together and brought about the sale transaction with intent to defraud defendant 1's brother Venkataramayya."

In appeal, the learned District Judge confirmed the findings of the learned Sub-Judge on all the above points, but he increased the interest payable by defendant 1 on Rs. 1,600. On the question regarding the plaintiff's right to recover costs which is the main point argued before me, the learned District Judge gave the following finding:

"It must therefore be taken that the plaintiff had knowledge of the sale to defendant 1's brother at the time he bought the land and his right to costs must be based upon that assumption. This being so, the transaction entered into between defendant 1 and the plaintiff seems to amount to a conspiracy to defraud defendant 1's brother, and if this be so, then the agreement to

indemnify the plaintiff contained in the sale deed (Ex. A) would be illegal and contrary to public policy."

I may here state that this latter observation refers to an agreement to indemnify contained in the sale deed on which special reliance was placed by the plaintiff in support of his claim for costs.

The main question of law for decision in this second appeal is this: Is the plaintiff a joint tortfeasor with defendant 1; and if so, is he entitled to recover the costs which he incurred in connexion with the Gudivada litigation conducted against him by defendant 1's brother? Before dealing with this question, I must first point out that this case is different from the class of cases where a person with the knowledge of a defect of the vendor's title to the lands takes a sale deed in his favour from the vendor. In such cases it has been held by this Court that

"knowledge of the purchaser of the defect of title in his vendor does not affect his right to recover damages"

when it is found that the sale deed is not enforceable: see the Full Bench decision in *Adikesavan Naidu v. Gurnatha Chetty* (1). The concurrent findings of the lower Courts show that the present case differs distinctly from that class of cases. Here the finding of the lower Courts is that the plaintiff, when he was told by defendant 1 that he had already entered into a contract with his brother to sell the suit lands to him, "tempted" him to break that contract by offering to purchase the lands at a higher price and also undertaking to risk the consequences of the litigation that might ensue as a result of the breach of contract. The learned Judge says, as already pointed out, that they

"colluded together and brought about the sale transaction with intent to defraud defendant 1's brother Venkataramayya."

The learned District Judge confirmed his opinion by saying that the transaction

"entered into between defendant 1 and the plaintiff seems to amount to a conspiracy to defraud defendant 1's brother."

These findings which are binding on me in second appeal distinguish this case from the class of cases referred to above and show distinctly that the plaintiff is a joint tortfeasor along with defendant 1 with reference to the transaction in question. The plaintiff knew that there

was a contract between defendant 1 and his brother; his interference in procuring a breach of that contract is a tort and is actionable. It is now the settled law that

"an action lies for procuring a person under contract with the plaintiff to break his contract: see Pollock on Torts, p. 340."

In this case having regard to the findings of the Courts below I have no doubt that the plaintiff and defendant 1 are joint tortfeasors as held by the learned Sub-Judge and the learned District Judge.

The next question is, whether being joint tortfeasors, the plaintiff is entitled to claim contribution from defendant 1 with regard to the costs incurred by him in the Gudivada suit. In England it has been held in the well-known case of *Merryweather v. Nixan* (2) that a suit for contribution between wrongdoers does not lie. The appellant argued that the principle of this decision should not be extended to India. Till very recently no definite pronouncement on this vexed question has been made by any Court in India; but in a recent decision of this Court, *Palepu Narayanamurthy v. Komali Chandrayya* (3), Waller, J., refused to follow this decision,

"as in a case from Scotland, *Palmer v. Wick Steam Shipping Co.* (4), the House of Lords refused to follow that decision holding that it was not founded on any principle of equity."

I shall refer to this decision presently. In *Siva Panda v. Jujusti Panda* (5), Benson and Bhashyam Ayyangar, JJ., observed that

"No plea having been raised against the maintainability of the suit on the ground that the plaintiff and defendant were joint tortfeasors, it is unnecessary to consider how far the rule in the English case of *Merryweather v. Nixan* (2), which Lord Herschell in *Palmer v. W. & P. Steam Shipping Co.* (4) at p. 324 felt bound to say did not appear to him 'to be founded on any principle of justice or equity or even of public policy, which justifies its extension to the jurisprudence of other countries,' should be followed in India or to consider the extent to which it was limited in England by the subsequent cases of *Adamson v. Jarvies* (6), *Palmer v. Wick Steam Shipping Co.* (4) and *Burrows v. Rhodes and Jameson* (7)."

(2) 8 T.R. 185=16 R.R. 810.

(3) A.I.R. 1927 Mad. 790=102 I.C. 835.

(4) [1894] A.C. 318=6 R. 245=71 L.T. 163.

(5) [1902] 25 Mad. 599=12 M.L.J. 13.

(6) [1826] 4 Bing 62=12 Moore P.C. 241=5 L.J. (o.s.) C.P. 68.

(7) [1899] 1 Q.B. 816=68 L.J. Q.B. 545=80 L.T. 591=48 W.R. 13=63 J.P. 532=15 T.L.R. 286.

(1) [1917] 40 Mad. 838=39 I.C. 358.

In *Shakul Kameed Alim Sahib v. Syed Ebrahim Sahib* (8), at p. 375 the following observations occur :

"Even assuming the rule of law laid down in *Merryweather v. Nixan* (2), forms part of the jurisprudence of this country (and this seems doubtful), see the observations of Lord Herschell in *Palmer v. W. & P. Steam Shipping Co.* (4) the doctrine does not apply to this case. In *Merryweather v. Nixan* (2), the suit was in tort. Here the suit was not in tort. Even the English doctrine is restricted to cases where it must be presumed that the party knew he was committing an unlawful act; *Pearson v. Skelton* (9), or the act is of an obviously illegal character: *Betts and Drewe v. Gibbons* (10)."

In *Nihal Singh v. The Collector of Bulandshahr* (11), it was observed :

"it is somewhat doubtful whether the doctrine of *Merryweather v. Nixan* (2), should be applied to India, but it is certain that it will not be extended : see the remarks of the other noble Lords who decided *Palmer's case* (4). In our opinion however the question hardly arises in the present case."

It will be observed that

"in one of these three last mentioned cases was the question, how far the rule in *Merryweather v. Nixan* (2), should be followed in India, was decided though having regard to the remarks of the noble Lords who decided *Palmer's case* (4) doubts were expressed whether the doctrine should be applied at all in this country."

It is now well recognized in England that the rule as between joint wrong-doers, one who has been sued alone and compelled to pay the whole damages has no right to indemnify or contribution from the other, was too widely laid down in *Merryweather v. Nixan* (2). This rule was considered in *Palmer v. W. & P. Steam Shipping Co.* (4). In that case a joint decree had been obtained against two persons for negligence. One of the judgment-debtors paid the entire amount of the decree and sued the other for contribution. The case came from Scotland. Lord Herschell observed at p. 324 of the report :

"Much reliance was placed by the learned counsel for the appellant upon the judgment in the English case of *Merryweather v. Nixan* (2). The reasons to be found in Lord Kenyon's judgment, so far as reported, are somewhat meagre and the statement of the facts of the case is not less so. It is now too late to question that decision in this country, but when I am asked to hold it to be part of the law of Scotland I am bound to say that it does not appear to me to be founded on any principle of justice or equity, or even of public policy, which justifies its extension to the jurisprudence of other countries."

(8) [1903] 26 Mad. 373.

(9) [1836] 1 M. & W. 504=1 Tyr. & G. 848.

(10) [1834] 2 Ad. & E. 57=4 N. & M. 64=4 L. J. K.B. 1.

(11) [1907] 38 All. 237=33 I.C. 165.

It is on the strength of this decision that it is now argued that the principle of the decision in *Merryweather v. Nixan* (2), should not be applied in this case. In England by various decisions the application of the rule in *Merryweather v. Nixan* (2), has been limited to a special class of cases. The limits of the rule together with the cases bearing on the point are thus stated in Salmond on Torts at p. 103, para. 2 :

"The better opinion is that the rule in *Merryweather v. Nixan* (2) applies only to cases of wilful and conscious wrong-doing, and that it is not applicable to cases of mere negligence, accident, mistake, or other unintentional breaches of the law. In *Betts v. Gibbons* (10), it is said by Denman, C. J., the general rule is that between wrong-doers there is neither indemnity nor contribution ; the exception is where the act is not clearly illegal in itself."

So in *Adamson v. Jarvies* (6), Best, C.J. says :

"From reason, justice and sound policy the rule that wrong-doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act."

In *Palmer v. W. & P. Steam Shipping Co.* (4), Lord Herschell quotes these observations with special approval and regards them as establishing a right of contribution in a case of joint negligence. The learned author then states the statutory exceptions to the rule in *Merryweather v. Nixan* (2) and finally concludes by saying :

"Except in the case of wilful wrong-doing, there is, if the foregoing interpretation of the rule in *Merryweather v. Nixan* (2) is correct, a right either of contribution or of indemnity between joint wrong-doers."

In similar language the limitation of the rule is stated also in Pollock on Torts : see the Edn. 13, p. 203. In Clerk and Lindsell on Torts (see p. 60) the limitation of the rule in *Merryweather v. Nixan* (2), is thus stated :

"If an act is manifestly unlawful, or the doer of it knows it to be unlawful as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or indemnity against the liability which results therefrom. An express promise of indemnity to him for the commission of such act is void."

The statement is based on the authority of *Burrows v. Rhodes & Jamson* (7). In that case Kennedy, J., observes thus :

"It has, I think, long been settled law that if an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom. An express promise of indem-

nity to him for the commission of such an act is void. . . . Where the circumstances constituting the unlawfulness of the act are known to the doer of it, his inability to claim contribution or indemnity appears to me to be clear."

The law thus stated was approved in *Weld Blundell v. Stephens* (12). In *W.H. Smith & Son v. Clinton and Harris* (13), the law was thus summarized by Coleridge, J. :

"The law appears to me to be as follows : It was very clearly discussed whether there was any implied contractual relation between two joint tortfeasors so as to entitle one to contribution against the other, where one suffered all the consequences of the wrong doing. The result of the various decisions seems to be that where one person requests another to commit an indifferent act, of which the illegality does not appear but which may subsequently be proved tortious, the contractual relation may arise ; and where one party induces another party by fraud to commit a tortious act and that other party does not in fact know and need not be presumed to know that he was doing an unlawful act, he may have redress or contribution. The principle however of there being no contribution between tort-feasors is confined to cases where the party seeking redress or contribution may be presumed to know that he was committing an unlawful act."

From a consideration of the above authorities two points emerge, viz., (1) that though the rule in *Merryweather v. Nixan* (2), is not applicable in its broadest form, still if an act is unlawful or the doer of it knows it to be unlawful as constituting either a civil wrong or a criminal offence he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom; and (2) that an express promise of indemnity to him for the commission of such an act is void.

Now the question is why should not the rule in *Merryweather v. Nixan* (2), as modified by the subsequent decisions in England and followed in that country be not followed in the present case? There may be no equity or reason or justice in support of the rule in its broad form but in its modified form which confines the application of the rule to cases where the doer of the act knows that the act he commits to be unlawful as constituting a civil wrong or a criminal offence and then deliberately brings about the commission of such an act, why should the doer be helped in claiming contribution against the liability resulting from his action? Surely, the plea that there

is no justice or reason behind the rule cannot be urged against the modified form of the rule in *Merryweather v. Nixan* (2) for, it prevents contribution being claimed only by persons who knowingly commit an unlawful act. However much one may not be inclined to extend the rule in *Merryweather v. Nixan* (2) more than is absolutely necessary, I see no reason against the modified rule in that case being applied in India as in England. If the modified form of the rule may be followed here as in England the answer to the question whether the plaintiff is or is not entitled to claim contribution in any particular case would depend upon the circumstances of that case. Having regard to the circumstances of the present case which I have narrated above, I think this is a proper case in which the modified rule in *Merryweather v. Nixan* (2), which obtains in England, may well be applied. In this case the plaintiff knew well that defendant 1 had already entered into a contract with his brother for the sale of the lands; in spite of the information which was given by the defendant he "tempted" him to break the contract by offering a higher price and undertaking all the risks of the litigation that may happen as a result of the breach of the contract. As stated by the learned District Judge, he conspired with defendant 1 to defraud defendant 1's brother by persuading him to break the contract which he (defendant 1) had entered into with him. He has clearly committed an act which is a civil wrong and he has done that with intent to injure defendant 1. In this connexion I must also mention that the circumstances of the previous litigation show that the respondent was merely a formal defendant in the previous suit and not personally interested in the result of it. This is clear from the fact stated by the learned District Judge that :

"defendant 1 (respondent) did not contest that litigation and the litigation was carried on solely by the plaintiff (appellant)."

I would also refer to the finding by the District Munsif on issue 1-a, already referred to that the appellant undertook "to risk the consequences of the litigation, if any, with Venkata-ramayya," as alleged by the respondent. If so, apart from all other considerations, why should the appellant be allowed to claim contribution from

(12) [1920] A. C. 955=89 L. J. K. B. 705=123 L. T. 598=64 S. J. 529=36 T.L.R. 640.

(13) [1908] 99 L. T. 840.

the respondent regarding the costs of that litigation? In these circumstances I am inclined to hold, following the rule of English law enunciated in the cases above referred to, that the plaintiff should not be allowed to claim contribution from defendant 1 for his costs incurred in the Gudivada suit. To allow him to claim contribution in this case would, in my opinion, be unjust and unreasonable. My attention was drawn by the respondent to the decision of the Calcutta High Court in *Gobind Chunder Nundu v. Sri-gobind Choudhury* (14). In that case :

"S granted to G and A a putni of a certain share in a zamindari, and thereupon P brought a suit against G, S and A for specific performance of an agreement to grant to him (P) the same share. That suit was decreed with costs, the whole of which was realized from G. In a suit for contribution brought by G against S and A the lower appellate Court found that G, S and A had conspired in setting up a false defence in the former suit in order to defeat P's claim. It was held in second appeal that, assuming such collusion were proved, the suit for contribution was not maintainable, G, S and A being joint wrong doers."

It may be, as pointed out in *Mahabir Prasad v. Darbhangi Thakur* (15), that the denial by the defendants of a state of facts known by them to be true may not amount to an act legally wrongful disentitling one defendant from claiming contribution from the other with respect to the costs paid by him; still the case is an instance where a Court in India has not refused to apply the principle of non-contribution among joint tortfeasors. The decision in *Mahabir Prasad v. Darbhangi Thakur* (15) was not cited before me in the course of the arguments. I find that decision is a clear authority in support of the position which I have sought to establish in the foregoing paragraphs of this judgment, that there is no reason why in spite of the decision in *Palmer v. W. & P. Steam Shipping Company* (4) we should not apply in India the modified rule in *Merryweather v. Nixan* (2) in a proper case. In that decision Dawson Miller, C. J., with whom Adamji, J., agreed observed :

"That the rule of noncontribution between joint tortfeasors exists in India cannot, I think, be questioned; but the authorities appear to show that it ought only to apply to cases where the parties are wrong doers in the sense that they knew or ought to have known that they were doing an illegal or wrongful act."

The learned Chief Justice further pointed out :

"It seems clear that the doctrine of contribution is well recognized in this country and that the only cases in which it will not be enforced are those in which a liability arises out of a joint wrong or where the equities of the case demand that the plaintiff should not recover or where the party sued was merely a formal defendant in the previous suit and not personally interested in the result of it. Again, there may be cases where it is just and proper that the liability should be apportioned in equal shares."

I may state that in laying down these propositions the learned Chief Justice has given full weight to the view of Lord Herschell, L. C., in *Palmer's case* (4) that although it is now too late to question the decision in *Merryweather v. Nixan* (2) it did not appear to be founded on any principle of justice or equity which would justify its extension to the jurisprudence of other countries. The present case falls strictly within the rule of noncontribution as laid down in *Mahabir Prasad v. Darbhangi Thakur* (15). I have already stated in full the circumstances which, in my view, disentitle the appellant from claiming contribution from the respondent. From the facts of the case, so far as can be gathered from the judgment in *Palepu Narayanamurthy v. Komali Chandrayya* (3) it does not appear whether the plaintiff in that case was guilty of any wilful wrong doing as the plaintiff certainly was in the present case. If he was not so guilty, then he would certainly be entitled to contribution from the defendant and the case would in that view in no way conflict with the view which I have expressed above.

In support of his claim to contribution the plaintiff relied not only on the general law but also upon an agreement to indemnify him contained in the sale deed, Ex. A, executed in his favour by defendant 1. In Ex. A he states :

" if so, we or our heirs or relations, shall not raise any disputes at any time against you, your heirs and relations. I have not caused any alienations such as mortgage, sale etc., to others till now, in respect of this property. If any disputes should arise from any one in respect of this sale I shall settle them all at my own cost and allow you to enjoy this sale uninterruptedly."

In the first place, I am not sure whether the promise contained in the last sentence really amounts to an agreement to indemnify the plaintiff for costs in the litigation that may subsequently happen.

(14) [1897] 24 Cal. 330=1 C. W. N. 179.

(15) [1919] 4 Pat. L. J. 486=51 I. C. 697.

Having regard to the context in which the last sentence appears, it is difficult to say that the defendant has thereby entered into an independent agreement to indemnify the plaintiff. In that statement I think he only intended to affirm that he had a good title to the lands which he was prepared to defend if necessary. The District Judge's view of the agreement is this:

"Further, as to the promised indemnity contained in Ex. A it could hardly have been contemplated, assuming for a moment that the intention of the parties was innocent, to indemnify the plaintiff against a law in the title which the plaintiff knew at the time of the contract to exist; defendant 1 could only be taken to have agreed to indemnify the plaintiff against defects in the title and a litigation arising therefrom of which the plaintiff was not aware."

This is quite a possible view. In the second place, even if this amounts to an agreement to indemnify, it is clear from the decisions which I have already quoted, *Burrows v. Rhodes & Jameson* (7) and *W. H. Smith & Son v. Chinton & Harris* (13), that such an agreement cannot be given effect to. In the latter case, "the defendants gave to the plaintiffs who were printing and publishing a paper for them, an undertaking that they, the defendants, would indemnify the plaintiffs against any claims whatever that might be made against them in respect of any libel that might appear in the paper. A libel was inserted in the paper with the knowledge of the plaintiffs' staff and an action was brought against the plaintiffs in respect thereof which they had to compromise by paying a certain sum of money and costs. In an action on the undertaking to indemnify, it was held that such a contract could not be enforced in law."

For the above reasons, I hold that the plaintiff is not entitled to claim contribution from defendant 1 with regard to the costs incurred by him in the Gudivada Court nor is he entitled to claim any damages. The second appeal fails and is dismissed with costs.

P.R.S./P.N. *Appeal dismissed.*

A. I. R. 1932 Madras 7

JACKSON, J.

Govindan Nadar—Appellant.

v.

Natesa Pillai—Respondent.

Appeal No. 126 of 1930, Decided on 13th March 1931, against appellate order of District Judge, East Tanjore, D/- 14th July 1930 in A. S. No. 237 of 1929.

Civil P. C. (1908), S. 47—Executing Court cannot go behind decree—It must take decree at face value.

The executing Court cannot go behind the decree. It must take the decree at its face value. It can inquire whether the Court as evidenced on the face of the decree by seal and signature was a properly constituted Court competent to pass the decree, but it need not inquire, having satisfied itself of the competence, whether it is a decree which the Court ought to have passed. For such an inquiry it would obviously be necessary to go behind the decree.

If a decree is apparently a nullity, so that without going behind it the executing Court can see from its face that it is void, the executing Court is not bound to execute it: 44 Cal. 627, *Foll.*; A.I.R. 1925 Cal. 907, *Expl.*; 4 Pat. L.J. 240; 38 Mad. 682 and A.I.R. 1926 Mad. 429, *Ref.* [P 7 C 2; P 8 C 1]

R. Sundaralingam—for Appellant.

M. Patanjali Sastri—for Respondent.

Judgment.—The respondent applied to the District Munsif of Negapatam to exercise his inherent power under S. 115, Civil P. C., and stop a sale in execution of the decree in O. S. No. 53 of 1928. The District Munsif found that the application was neither bona fide nor founded upon fact and dismissed it. The District Judge, East Tanjore, has ordered further inquiry into the question whether defendant 1 was a lunatic and unrepresented at the time of the passing of the decree.

The auction-purchaser appeals on the ground that an executing Court cannot go behind the decree, and is not concerned with discovering whether in passing the decree the trial Court acted according to law.

It is an accepted principle that the executing Court cannot go behind the decree. To employ other words but the same metaphor, it must take the decree at its face value. It can inquire whether the Court as evidenced on the face of the decree by seal and signature was a properly constituted Court competent to pass the decree, but it need not inquire, having satisfied itself of the competence, whether it is a decree which the Court ought to have passed. For such an inquiry it would obviously be necessary to go behind the decree.

This is clearly laid down in *Kaliapada Sarkar v. Hari Mohan Dalal* (1) and by a Bench of five Judges in *Gorachand Halder v. Prafulla Kumar Roy* (2) (at

(1) [1917] 44 Cal. 627=35 I. C. 856.

(2) A.I.R. 1925 Cal. 907=39 I. C. 685=53 Cal. 166 (F.B.)

p. 173 of 53 Cal.). The Full Bench lays down the principle thus :

"Where the decree presented for execution was made by a Court which apparently had no jurisdiction, whether pecuniary, territorial or in respect of the judgment-debtor's person, to make the decree, the executing Court is entitled to refuse to execute it."

The word "apparently" here is important, and is a third way of expressing the same principle by the same metaphor, being synonymous with "on its face" or "without going behind." *Kaliapada Sarkar v. Hari Mohan Dalal* (1) has been questioned in *Jungli Lal v. Ladhu Ram* (3). On p. 247 it is observed that :

"that which is void can be treated as non-existent,"

and

"the executing Court is not bound to take notice of that which is a nullity although it may take the form of a decree."

This proposition in the abstract is unexceptionable, and if a decree is apparently a nullity, so that without going behind it the executing Court can see from its face that it is void, the executing Court is not bound to execute it. But in the vast majority of cases, and in the case now under appeal, the decree is not on its face void, and the executing Court has no ground for doubting its validity unless it goes behind it. In fact the order appealed against is a direction that the executing Court shall go behind it, and take evidence, not to discover whether the trial Court was, within its jurisdiction, able to pass this decree; but in order to discover whether it ought to have passed this decree. That the executing Court can hold no such inquiry is precisely laid down in *Kaliapada Sarkar v. Hari Mohan Dalal* (1) at pp. 636-7. The passage from "the substance of the matter" to "improperly made" is one which in my opinion and with all respect cannot be improved upon.

In *Subramania Iyar v. Vaithinatha Iyer* (4), the case relied upon by the learned District Judge, it is held that a question of nullity is an objection to the jurisdiction of the trial Court to pass the decree, and therefore one that can be rightly raised in execution. The Calcutta Full Bench probably had this case in mind when it emphasized the distinction between having no jurisdiction, and acting erroneously within jurisdiction: *Go-*

rachand Haldar v. Prafulla Kumar Roy (2).

In *A. I. R. 1926 Mad. 429* the learned Judge declines to interfere by way of revision in a Small Cause Suit, citing *Kaliapada Sarkar v. Hari Mohan Dalal* (1) and *Jungli Lal v. Ladhu Ram* (3) and observing that arguments might be put forward on either side.

The question is really one of forum, and it is not as though the aggrieved party had his only remedy in the Court of execution. That is made plain in the passage already referred to in *Kaliapada Sarkar v. Hari Mohan Dalal* (1). In such matters of procedure it is highly advisable that the Courts should follow uniform practice. The High Court of Calcutta has exhaustively examined all the authorities, citing between twenty and thirty cases, and by a Bench of five Judges has laid down a rule which conforms with the universally recognized principle. That is high authority with which this Court would hesitate to disagree. I therefore accept the law as laid down in *Kaliapada Sarkar v. Hari Mohan Dalal* (1) and allow this petition.

The order of the District Judge is cancelled. The District Munsif must proceed with the execution. Costs to petitioner.

P.R.S./B.V.

Petition allowed.

A. I. R. 1932 Madras 8

WALLACE AND MADHAVAN NAIR, JJ.

Avaru—Defendant—Appellant.

v.

Asi Bai and others—Plaintiffs—Respondents.

Second Appeal No. 1532 of 1925, Decided on 27th April 1931, against decree of Dist. Judge, South Malabar, in Appeal Suit No. 86 of 1924.

(a) *Malabar Tenants' Improvements Act* (1900), S. 3 (1)—"Tenant" includes lessee of land for building purposes.

The first part of the definition of "tenant" ending with the word "thereof" is wide enough to include a person to whom land has been let for building purposes. [P 10 C 2]

(b) *Malabar Tenants' Improvements Act* (1900), S. 4—Applicability.

The Act applies to non-agricultural tenants such as lessees of vacant sites leased for building purposes. *S. A. No. 1445 of 1889, Diss. from.; A. I. R. 1928 Mad. 929, Ref.; S. A. No. 614 of 1928, and S. A. No. 361 of 1880, Rel. on.; A. I. R. 1927 Mad. 776; 43 Mad. 65 and A. I. R. 1921 Mad. 409, Expl.* [P 11 C 1]

(3) [1919] 4 Pat. L. J. 240=50 I. C. 529 (F.B.).

(4) [1915] 38 Mad. 682=31 I. C. 198.

(c) Interpretation of Statutes — Courts should be guided by plain words of statutes.

Court should be guided only by the plain words of the statute. When the statute is clear, it cannot be qualified or neutralized by indications of intention gathered from previous legislation on the same subject : 22 Cal. 788 (P. C.), Ref. [P 13 C 1]

(d) Malabar Tenants' Improvements Act (1887) — Applicability — Compensation for dwelling houses erected on vacant sites was allowed under the old Act and even before and after it.

Before 1887 a claimant to compensation for improvements in Malabar, even though his title to the holding failed, that is, even though he was in the position of a squatter, was not disentitled to claim the value of the dwelling house which he had erected on the vacant site leased to him. Prior to the Act of 1887 it was usual to give compensation in such cases whether the grant was justified by Customary law or not. This right to claim compensation for dwelling houses erected on vacant sites was recognized by Act 1 of 1887. Prior to this Act dwelling houses were always considered to be improvements and this had been so, subsequent to the Act also. S. A. No. 361 of 1880, Ref. [P 11 C 2]

(e) Malabar Tenants' Improvements Act (1900), S. 4 — Holding — It means not only agricultural holding but as well means "tenure" or "occupation" of land.

The word "holding" does not necessarily mean that the land held is agricultural land. The term is not defined although it is used in several places in the Act. According to the Oxford Dictionary it means "tenure" or "occupation of land" and in the absence of a definition it may be taken that the word is used in this sense. [P 12 C 1]

(f) Malabar Tenants' Improvements Act (1900), S. 4 — Tenant of vacant site is entitled to compensation for houses built on it.

In the Malabar the tenant of a vacant site is always entitled to claim compensation for dwelling houses that he may have erected on the site. [P 12 C 2]

P. Govinda Menon—for Appellant.

B. Sitarama Rao and C. V. Harihara Ayyar—for Respondents.

Judgment.—Defendant 1 is the appellant. This second appeal arises out of a suit instituted by the plaintiff to recover possession of the suit property after the removal of the house standing on it. The appellant obtained the property, which was a vacant site, on lease for erecting a house for residential purposes. Under the lease-deed (Ex. H) he agreed to remove the house at his own expense whenever required by the owner. He now claims that before he is ejected he is entitled to be paid the value of the house under the Malabar Tenants' Improvements Act (Act 1 of 1900). It is conceded the "house" falls within the meaning of the term "improvement" as de-

fined in the Act and that if the Act applies, the undertaking to remove it cannot be enforced as it offends against the provisions of S. 19 of the Act. The learned District Judge disallowed the compensation for the house on the ground that the lease, being not an agricultural one, is governed by the Transfer of Property Act and not by the Malabar Tenants' Improvements Act.

The question we have to decide is whether the Malabar Tenants' Improvements Act applies only to agricultural leases and not to building leases (i. e., lease of vacant sites for building purposes) as well. On one side, it is argued that there is a statement in Mr. Logan's Malabar Manual, Vol. 2, App. 3 (cxc) that under the Customary law of Malabar only agricultural tenants were entitled to improvements, that such a statement was made as to the effect of Act 1 of 1887 in the Legislative Council, that an unreported decision of this Court—S. A. No. 1445 of 1889. (Under Act 1 of 1887) held that that was the law, that there is no reason to imagine that the legislature in passing Act 1 of 1900 departed from this rule and that the unreported decision has been followed very recently by Anantakrishna Ayyar, J. in S. A. No. 614 of 1928 which we may say, was decided during the time this second appeal remained part heard. On the other side, it is urged that having regard to the provisions of the present Act (Act 1 of 1900) which are clear, the statements made in Mr. Logan's Malabar Manual and in the Legislative Council should be disregarded that the Act clearly applies to building leases and that it was recently held by Jackson, J. in *Chathukutty v. Kunhappan* (1).

"It has invariably been held in Malabar that the Act applies to agricultural holdings and also to what are known as kudiyruppu, i. e., vacant sites available for building purposes," and that Anantakrishna, Ayyar, J. does not dissent from the decision in *Chauthukutty v. Kunhappan* (1).

We shall first refer to the provisions of the two Acts to which our attention was drawn. The first Act that was passed by the Madras Legislative Council to secure to tenants in Malabar compensation for the value of improvements was Act 1 of 1887. S. 2, Cl. 1 of this Act defines "tenant" as follows:

(1) A. I. R. 1927 Mad. 776=103 I. C. 677=50 Mad. 813.

"In this Act, unless there is something repugnant to the context or subject-matter 'tenant' means a person who holds land under another person and is, or but for special custom or contract would be liable to pay rent for that land to that person."

Section 3, Cl. 1 defines "improvements" as meaning:

"any work which adds to the value of the holding which is suitable to the holding and consistent with the purpose for which it was let."

Clause 2 of this section in enumerating what are deemed to be improvements states amongst others that:

"until the contrary is shown the following shall be presumed to be improvements within the meaning of the Act: (a) the erection of dwelling houses, buildings appurtenant thereto and farm buildings; (b) the construction of tanks wells, channels, dams and other works for the storage or supply of water for agricultural or domestic purposes. S. 4 states that every tenant who is ejected from his holding shall notwithstanding any custom to the contrary be entitled to improvements."

As Act 1 of 1887 failed to achieve its purpose fully, the legislature amended the law by repealing it and enacting the present Act 1 of 1900. By this Act the definition of the term "tenant" was thoroughly recast and its scope was enlarged to include the claim of a "squatter" for compensation which it was thought did not fall within the definition under the repealed Act. The definition of the term "improvement" was also modified by adding "the product of a work" to the definition under the old Act. By S. 3, Cl. 1 of this Act the term "tenant" is defined as follows:

"Tenant, with its grammatical variations and cognate expressions, includes a person who as lessee, sub-lessee, mortgagee or sub-mortgagee or in good faith believing himself to be lessee, sub-lessee, mortgagee or sub-mortgagee of land is in possession thereof, or who with the bona fide intention of attorning and paying the customary rent to the person entitled to cultivate or let waste land, but without the permission of such person brings such land under cultivation and in occupation thereof as cultivator."

Sub-Cl. 3 of the same section defines "improvement" to mean:

"any work or product of a work which adds to the value of the holding, is suitable to it, and consistent with the purpose for which the holding was let, mortgaged or occupied."

Section 4 deals with what are deemed to be "improvements" and states amongst other things:

"that the erection of dwelling houses as under the old Act shall be presumed to be an improvement and S. 5 states that every tenant shall be entitled to compensation on ejection."

It is nowhere stated in the Act that its operation is limited to agricultural

tenancies; on the other hand, such indications as we have of the intention of the Act show that it would be difficult to restrict its operation to such tenancies. The title and the preamble of the Act show that it applies generally to all tenants in the Malabar District and if it had been the intention of the legislature to restrict its operation to agricultural tenancies only, nothing was easier than to add the qualifying words "agricultural" before the word "tenants." The first part of the definition of "tenant" ending with the word "thereof" is wide enough to include a person to whom land has been let for building purposes. We cannot accept the plea that the scope of this part of the definition which stands apart from the rest of the clause should be limited to agricultural tenancies because when referring to quite a different class of people as tenants in the same clause (viz., "squatters") the words "cultivation and cultivator" are used; on the other hand, it may well be argued that the absence of such words in the first part of the definition shows that the legislature deliberately intended to include non-agricultural tenants, such as lessees holding land for building purposes within its scope. The plea urged before us was rejected by Anantakrishna Ayyar, J., when it was urged before him in S. A. No. 614 of 1928. Another indication as regards the intention of the legislature may be found in S. 4 of the Act which in Cl. (a) refers to

"the erection of dwelling houses as a work which shall be presumed, until the contrary is shown, to be an improvement for the purposes of the Act."

Clause (b) of this section refers to certain other works "for agricultural purposes." The absence of such a qualification in Cl. (a) lends support to the suggestion that "dwelling houses" shall always be deemed to be improvements until the contrary is shown irrespective of the purpose for which the land on which these stand may have been leased. The fact that "dwelling houses" are grouped together with "farm buildings" in the same clause cannot in our opinion be relied on to show that these, to be deemed improvements, should be appurtenant to a holding for agricultural purposes. If that was the intention of the legislature appropriate

words might have been used to express that intention as has been done in the subsequent clause which refers to tanks, wells, channels, etc. Agricultural tenancies of land as distinguished from other forms of tenancies are well known to law and if the intention of the legislature was to restrict the operation of the Act to agricultural tenancies alone nothing was easier for the legislature than to state it in the preamble or in the sections of the Act, as was done for example in the corresponding Act in the N. W. P. (Act 12 of 1881 as amended by Act 14 of 1886) which enacted :

"Nothing herein contained applies to land for the time being occupied by dwelling houses or manufactories or appurtenant thereto, so long as such land is not let to agricultural tenants."

In this connexion the observations of Sundara Ayyar, J., in his book on Malabar Law edited by Mr. Sitarama Rao (see p. 297) as regards the scope of the two Acts may be referred to with advantage:

"The Act applies not only to the kanomdar but also to all classes of lessees, sub-lessees, mortgagees, sub-mortgagees, in possession and also to persons who are bona fide in possession with the intention of paying rent to the person entitled to let the waste land but without the permission of that person. The last is the case of a pure squatter that used to be introduced by the Government to whom reference has already been made. In Mr. Logan's Manual, Vol. 2, App. 3 (exc) there is a statement that under the Customary law, only agricultural tenants are entitled to improvements. A similar statement was made as to the effect of the Act of 1887 by Mr. Subramania Ayyar, as he then was, in the Legislative Council. *It is doubtful if this is correct; at any rate, it would seem difficult to so restrict the later Act.*"

(The italics are mine).

In this connexion see also p. 345. In our opinion Act 1 of 1900 applies to non-agricultural tenants such as lessees of vacant sites leased for buildings purposes.

If the sections of the present Act clearly indicate that its operation is not limited to agricultural tenancies alone, it is needless to inquire what the Customary law that prevailed prior to the legislation was, and whether the repealed Act 1 of 1887 applied only to agricultural tenancies; for we should be guided only by the plain words of the statute. However, as the point was argued, we shall briefly deal with it. Assuming that under the Customary law of Malabar only agricultural tenants

were entitled to the value of the improvements, it is not quite clear whether the Courts in actually administering the law before the Act 1 of 1887 was passed, ever gave effect to the Customary law with strictness, for we find in a well-known book of Malabar law entitled "A Manual of Malabar law as administered by the Courts" by Cuddalore Ramachandra Ayyar, Subordinate Judge of South Malabar, Calicut, published in July 1883, reference to a decision of this Court, S. A. No. 361 of 1880 to the effect that a lessee of vacant land let out for building purposes was entitled before ejectment to get compensation for the dwelling house he had erected on it. In S. 301 of the book under the heading, Illus. (b) the facts of the case are thus summarized :

"Where a house worth Rs. 3,000 had been erected on a waste paramba given by the kervan of a tarwad to his own wife, the High Court refused to allow the tenant to be disturbed without receiving compensation, though the plaintiff sought to set aside the alienation of the site as prejudicial to the interests of the tarwad: see S. A. No. 361 of 1880.

On examining the record we find that the plaintiff claimed compensation for a house built on a vacant site in a crowded locality of residential houses in Kollengode village. The District Munsif granted compensation. The District Judge thought that the claim was not justified under the Customary law, but the High Court maintained the Munsif's decree on the ground that

"it would be contrary to the rule of good conscience that the plaintiff should recover without compensating defendants 4 and 5. . . ."

This case shows that a claimant to compensation for improvements in Malabar, even though his title to the holding fails, that is, even though he is in the position of a squatter, is not disentitled to claim the value of the dwelling house which he has erected on the vacant site leased to him. It would thus appear that prior to the Act of 1887 it was usual to give compensation in cases like the present whether the grant was justified by Customary law or not. We may mention that the right to compensation in the abovementioned case is referred to in Mr. Ramachandra Aiyar's book as based on custom. In our view, this right to claim compensation for dwelling houses erected on vacant sites was recognized by Act 1 of 1887. S. 4 of the Act already quoted states that un-

til the contrary is shown the erection of dwelling houses shall be presumed to be improvements for the purposes of the Act. In the commentaries of Act 1 of 1887 reference is made to S. 301 of Mr. Ramchandra Ayyar's book. It follows therefore that prior to this Act dwelling houses were always considered to be improvements and this has been so subsequent to the Act also. We may here refer to S. A. No. 1445 of 1889, the unreported decision relied on by the respondent. It, no doubt, held that the provisions of the Act of 1887, the repealed Act, do not apply to building leases. This conclusion is based on the following reasoning:

"Dwelling houses described in S. 3, Cl. 2 of the Act are grouped together with farm houses, and the term 'improvement' itself is defined in the Act as 'a work which adds to the value of the holding.' In their ordinary sense the words appear to us to refer to dwelling houses appurtenant to a holding for agricultural purposes and not to dwelling houses within the limits of a town for purposes of residence only."

The learned Judges state also that

"dwelling houses for which compensation was claimed in this suit form admittedly no part of an agricultural holding."

We may observe that they do not refer in their judgment to the definition of the term "tenant" which is very wide and that the word "holding" does not necessarily mean that the land held is agricultural land. The term is not defined although it is used in several places in the Act. According to the Oxford Dictionary it means "tenure" or "occupation of land" and in the absence of a definition it may be taken that the word is used in this sense. If the legislature intended that the word should mean "agricultural holding," then it would have used "agricultural" before the word "holding." Legislatures are not unfamiliar with the expression "agricultural holding:" see for example the English Agricultural Holdings Act, 1883. We may also observe that the grouping of "dwelling houses" along with farm buildings in enumerating what shall be deemed to be "improvement" under the Act either by itself or by combination with "holding" is, as we have already shown, not a sufficient justification to show that dwelling houses in Cl. (a), S. 3 mean dwelling houses appurtenant to a holding for agricultural purposes. The construction adopted by the learned Judges is opposed to the plain words of

the section in enacting which the legislature simply gave sanction to the practice followed in Malabar of treating "dwelling houses" as improvements for which compensation may be claimed. It is open to considerable doubt whether the decision in S. A. No. 1445 of 1889, being unreported and presumably unknown, was ever used in Malabar in preference to the ruling in S. A. No. 361 of 1880 which must have been familiar to those who had to deal with questions of the kind raised in that case. For these reasons we are of opinion that in spite of the decision in S. A. No. 1445 of 1889, compensation was always given to lessees who built dwelling houses on vacant sites leased to them for erecting houses for residential purposes whether such houses were erected in villages or towns and that Act 1 of 1887 was never understood to stand in the way of awarding compensation in such cases.

The argument that the old Act (Act 1 of 1887) was intended only to apply to agricultural tenancies and there is no reason why a different intention should be imputed to the legislature, when it passed the Act 1 of 1900 does not present to us any difficulty. It may be that it was intended that the Act of 1887 should apply only to agricultural tenancies as at the time that is, 1887, the local legislature under the Indian Councils Act 1861 could not pass legislation affecting the operation of the Transfer of Property Act—an Imperial Act which applied to all tenancies other than agricultural. But the intention, as we have shown, does not seem to have been carried out effectively in actual practice. As pointed out in Sundara Ayyar, J's. book, it is doubtful if the statement that the repealed Act applied only to agricultural tenancies is correct. But however that may be, this disability of the local legislature to pass Acts affecting the operation of the Imperial Acts was removed by the Statute of 1892, so that in 1900, when the Improvements Act 1 of 1900 was passed, it had power with the sanction of the Governor-General in Council to pass legislation regarding tenancies other than agricultural.

The new Act is not a mere repetition of the old Act. Its scope was enlarged and it was modified in various respects. If the old Act was intended to apply only to

agricultural tenancies, there is nothing to show that the intention of the new Act is the same, having regard to its sections which, as we have already shown do not restrict its operation to agricultural tenancies. When the statute is clear, it cannot be qualified or neutralized by indications of intention gathered from previous legislation on the same subject: see *Administrator-General of Bengal v. Premlal Mullick* (2).

We shall now consider the decisions of this Court under the Act (Act 1 of 1900) having a bearing on this point. There are only two decisions directly bearing on the question, these two being a decision of Jackson, J., in *Chathukutty v. Kunhappu* (1), and a recent decision by Anantakrishna Ayyar, J., in S. A. No. 614 of 1928. Before we discuss these cases attention may be drawn to two other decisions of this Court, viz. *Kallingal Moosa Kutti v. Secretary of State* (3) and *Ullattuthodi Choyi v. Secy. of State* (4) which, though not useful as direct decisions on the point are yet, in our opinion, very helpful as an inference may be drawn from them regarding the view generally held as regards the scope of Act 1 of 1900. The facts of the cases, so far as they are relevant to the point under consideration, are very similar to the facts of the present case, the only important difference being that in both the cases the lessor was the Secretary of State for India in Council. In both the cases the leases were of parambas and in one there was a clear undertaking on the part of the lessee to pull down and remove all the buildings at the time of surrender without demanding compensation. The lessees claimed compensation for the value of the dwelling houses erected by them when they were called upon to surrender the lands and it was held that the provisions of the Malabar Tenants' Improvements Act as to eviction of tenants on payment of compensation to them for improvements does not apply to Crown grants which do not provide accordingly: see *Ullattuthodi Choyi v. Secy. of State* (4) following *Kallingal Moosa Kutti v. Secy. of State* (3). No attempt was made in either of those cases to justify the disallowance of compensation on the ground

that the Malabar Tenants' Improvements Act applied only to agricultural tenancies and not to building leases. The judgments would rather show that it was assumed that the Malabar Tenants' Improvements Act would apply but for the provisions of the Crown Grants Act. In this connexion attention may be drawn to the following extract from the judgment in *Kallingal Moosa Kutti v. Secy. of State* (3):

"On the second point we feel no doubt that the wide language of S. 3, Crown Grants Act, is conclusive. The Government have especially armed themselves with powers which they have withheld from private parties, presumably on the ground that they are not likely to misuse them. It is clear to us that those contracts are not within the mischief of S. 19, Malabar Compensation for Tenants' Improvements Act."

This would show by implication that the learned Judges were prepared to apply the Tenants' Improvements Act but would not do so on account of S. 3, Crown Grants Act. In *Ullattuthodi Choyi v. Secy. of State* (4), the following observations occur:

"It is now said that he cannot be evicted until he has received compensation under the provisions of the Malabar Compensation for Tenants' Improvements Act. To allow such a provision of that Act to take effect would prevent the Crown Grant in question from taking effect according to its tenor. We entirely agree with the decision on this point in *Kallingal Moosa Kutti v. Secy. of State* (3)."

In this case *Ullattuthodi Choyi v. Secy. of State* (4), it may have been possible to say that the lease was an agricultural one; but the proceedings in the case show that it was throughout treated as a lease of a paramba. Attention may be drawn to the following observations of the District Munsif as they refer to the practice followed in Malabar in such cases and also show that the argument put forward was that the lease being a non-agricultural one the tenant cannot plead S. 19 of the Act.

"The more important question is about the buildings in the paramba. One or two of them are useful as dwelling houses... it has been the usual practice to allow their value in favour of the tenant. There is hardly any lease in Malabar given for the purpose of building shops or dwelling houses. Yet it has been the rule to allow the tenant the value of shops and dwelling houses when none of them is inconsistent with the holding. I do not think that Government who are most solicitous about the welfare of the tenant ought to ask the Court to construe the provisions of the Act against the interests of the tenant."

The District Munsif overruled this argument and allowed compensation. The

(2) [1895] 22 Cal. 788=22 I.A. 107 (P.C.).

(3) [1920] 43 Mad. 65=53 I.C. 345.

(4) A.I.R. 1921 Mad. 403=39 I.C. 475.

learned District Judge treated the lease as a Crown grant and set aside the order of the District Munsif. The High Court also, as may be seen from the extract quoted above proceeded on the same lines.

Coming now to the decisions under Act 1 of 1900 which have a direct bearing on the question we shall first deal with *Chathukutty v. Kunhappu* (1). The facts in that case were as follows :

"The plaintiff let to the defendant a shop in a town in Malabar for five years the tenant agreeing to remove a bakery oven erected by him thereon, when surrendering the shop at the end of five years. At the end of five years the plaintiff sued to recover arrears of rent and the land. The defendant pleaded, inter alia, that he should be paid compensation for the oven . . ."

In support of the plea that the tenant was not entitled to compensation, two arguments were pressed before the learned District Judge (Mr. V. P. Rao), these being : (1) that the tenant of a house is not a lessee of land within the meaning of the Act and (2) that the Act applied only to agricultural tenancies. The first was disallowed on the ground that the point was taken for the first time in appeal and on the second the learned District Judge expressed the opinion that the Act (Act 1 of 1900) was not confined to agricultural tenancies. On this point he stated :

"The Act has been hitherto applied in practice to Kudiyiruppu tenants i. e., tenants of land for building houses for themselves and they have been awarded compensation for such houses without any question in all these years."

In the result, compensation under the Act was awarded to the tenant. In Second appeal it was held by Jackson, J., that the defendant was not entitled to compensation as the tenant of a house or a shop is not a lessee within the meaning of the Malabar Tenants' Improvements Act. On the second point which is the one we are concerned with in this case he agreed with the District Judge and stated thus :

"I think it has invariably been held in Malabar that the Act applies to agricultural holdings and also to what are known as Kudiyiruppu or vacant sites available for buildings."

The present case as it relates to a claim for compensation for a house built on a vacant land leased out for erecting buildings, comes literally within the latter part of this rule and therefore the tenant should be held entitled to claim compensation for the house. This case i. e., *Chathukutty v. Kunhappu* (1) is referred to in *Pathamma Umma v. Moi-*

deen (5) decided by Srinivasa Ayyangar and Reilly, JJ. A perusal of the judgment of Reilly, J., leaves the impression that he was inclined to hold, if necessary that even the lessee of a house in Malabar comes within the purview of this Act; but it was not necessary for him to express any opinion on the point as he found that the house in that case was not an improvement within the meaning of the Act. In the present case the questions whether the tenant of a house leased to him comes within the Act or not and whether the scope of the Act is restricted to agricultural lands and vacant sites do not arise for consideration and we express no opinion on them. On the point we are called upon to decide, that is, whether a lessee of a vacant site is entitled to compensation under the Act for the house erected by him both the learned Judges agree with the judgment of Jackson, J., in *Chathukutty v. Kunhappu* (1).

The next case having a somewhat direct bearing on the point is the decision of Anantakrishna Ayyar, J., in S. A. No. 614 of 1928. In that case the President District Board, Malabar, leased to the defendant a roadside poramboke. When he was called upon to surrender the site he claimed compensation under the Act for a house which he had built on it though he had undertaken in the lease deed not to claim compensation for the improvement that he might make on the property. His claim was disallowed in all the Courts. The judgment in the second appeal is relied on to show that Act 1 of 1900 applies only to agricultural tenancies. The learned Judge no doubt refers amongst other things to the unreported decision S. A. No. 1445 of 1889 and also to Act 1 of 1887 and the speech in the Legislative Council when that Act was introduced, considerations which might lead one to think that in his opinion the present Act applies only to agricultural tenancies but on a careful perusal of the judgment we can find nowhere in it any such decisive statement. On the other hand he agrees with the decision in *Chathukutti v. Kunhappu* (1) and distinctly says that he does not think it requires any reconsideration. In his view that decision did not apply to the case before him because he understood the

(5) A. I. R. 1928 Mad. 929=110 I. C. 752.

finding in the case to be that the suit land is a roadside poramboke; in other words, it is neither an agricultural holding nor a building site available for building purposes. He also held that in the circumstances of the case the house in question was not an improvement within the meaning of the Act.

In our view the decision in S. A. No. 614 of 1928 does not lend any substantial support to the argument of the respondent. However if the decision is to be understood as an authority for the position that the Malabar Tenants' Improvements Act of 1900 applies only to agricultural tenancies then with all deference to the learned Judge, we cannot agree with his view. In passing, we may observe that though the facts in S. A. No. 1445 of 1889 are similar to those in *Chathukutty v. Kunhappu* (1) having regard to the reasoning in the judgment in that case and the principle on which the judgment was rested it appears to us that the question which Jackson, J., had to decide in *Chathukutty v. Kanhappu* (1) was *res integra*. We may also say that the decision in S. A. No. 1445 of 1889 was used before us solely for showing that the operation of Act 1 of 1887 was restricted to agricultural tenancies and we do not understand the case to have been used for any other purpose in S. A. No. 614 of 1928.

For the above reasons, we are of opinion that the operation of Act 1 of 1900 is not restricted to agricultural tenancies, that it applies to building leases as well, that in this view it is unnecessary to consider what the law was prior to 1900 and that even if it is necessary to refer to the prior law on the ground that the words of the statute are not very clear, the law administered in Courts without any question for over a century has always been to the effect that in Malabar the tenant of a vacant site is always entitled to claim compensation for dwelling houses that he may have erected on the site. We think it is now too late to reconsider the law on the strength of an unreported decision of this Court as old as 1889 and on the policy of the Act of 1887 which itself is not very clear.

We would therefore allow this second appeal and grant the appellant compensation for the value of the house erected on the plaint site. But as the lower Courts have not recorded a finding

on this point, before we allow the second appeal, we would ask the District Judge to submit a finding as regards its value; the District Judge is at liberty to send the case to the Sub-Court for the finding. Fresh evidence on this point may be taken. Two months for the finding and ten days for objections.

(In compliance with the order contained in the above judgment, the Subordinate Judge of Cochin submitted the following)

Finding

"What is the value of the building to which the defendant is entitled."

In conclusion my finding is that the defendant is entitled to Rs. 899-6-2 only.

(This appeal coming on for final hearing after the return of the finding of the lower Court upon the issue referred by this Court for trial, the Court delivered the following)

Judgment.—The finding has been returned that the value of the house in the plaint site is Rs. 899-6-2. Plaintiff takes objection that the building valued by the lower Court projects in part beyond the plaint site. It may be so, but the projection cannot make any real difference to the value since plaintiff himself agreed before the lower Court on remand that the building now valued was the building which had to be valued (Finding para 8).

We accept the finding and set aside the decree of the lower appellate Court and modify the decree of the trial Court by decreeing that after the word "shall" the words "remove . . . and" be struck out and the words "on payment by plaintiff to defendant of Rs. 899-6-2" be inserted. The defendant will get his costs here from the plaintiff.

P.R.S./B.V.

Decree set aside.

A. I. R. 1932 Madras 15

VENKATASUBBA RAO, J.

(Darbhamaulla) Subbamma—Plaintiff—

v.
Valivetti Veerayya and others—Defendants—Respondents.

Second Appeals Nos. 1718 and 1719 of 1926, Decided on 18th March 1931, against decrees of Sub-Judge, Narasapur, in A.S. No. 67 of 1925.

(a) Partition Act (4 of 1893), S. 4—Applicability.

Section 4 applies to the case of a dwelling house, a share of which has been . . .

a stranger. Three conditions must be fulfilled before S. 4 comes into operation :

(1) The suit must relate to a dwelling house of an undivided family ; (2) some share in it must have been transferred to a stranger ; and (3) the stranger transferee must have sued for partition. Even if the subject of the dispute is a dwelling house, unless there be a stranger transferee, S. 4 does not apply.

Independent of the Partition Act, the Court has an inherent power to refuse to divide a property by metes and bounds and to adopt such other means as may appear equitable, for effecting a just partition : *A. I. R. 1929 All. 443, Appr. ; 11 I. C. 370, Ref.* [P 16 C 2]

(b) Partition Act (1893), S. 6—When applies.

Where a sale is directed under S. 2 and S. 3 does not apply, it is nevertheless governed by S. 6 : *A. I. R. 1926 Cal. 1190 ; 24 I. C. 273 and A. I. R. 1927 All. 686, Expl.* [P 17 C 1]

K. Venkatarama Raju—for Appellant.
N. Rama Rao and P. Panani Rao—for Respondents.

Order.—The Courts below have not paid the slightest attention to the sections of the Partition Act which they profess to apply. S. 3 of that Act has always been a source of trouble, but even that fact cannot excuse the total disregard by the lower Courts of even the other provisions of the Act.

The facts may be briefly stated. The joint family to which these appeals relate consists of six members, the father, defendant 1, and the sons, defendants 2 to 6. Defendant 2 conveyed his sixth share in some items to the plaintiff in O. S. 267 of 1922 for Rs. 200. He similarly sold his interest in certain other items to the plaintiff in O. S. 268 of 1922 for Rs. 800. Each alienee has filed a suit claiming his share in the items alienated. In their written statement the defendants offered to buy the plaintiff's share at a valuation. In each case, the lower Courts, purporting to apply the Partition Act, have fixed the price of the plaintiff's interest and directed her to receive the amount in lieu of her share in the items conveyed. The plaintiffs question the correctness of this order.

I shall first consider the various sections of the Act before examining whether the orders can be sustained. In the first place, there is a broad distinction between Ss. 2, 3 and 6, forming a group, on the one hand, and S. 4 on the other. Cl. 1 of the lastmentioned section runs thus :

"Where a share of a dwelling house belonging to an undivided family has been transferred

to a person who is not a member of such family' and such transferee sues for partition, the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf."

It applies to the case of a dwelling house, a share of which has been transferred to a stranger. Three conditions must be fulfilled before S. 4 comes into operation : (1) the suit must relate to a dwelling house of an undivided family ; (2) some share in it must have been transferred to a stranger and (3) the stranger transferee must have sued for partition.

In the case of the other sections, one of the parties to the dispute may or may not be a stranger. Even if the subject of the dispute is a dwelling house, unless there be a stranger transferee, S. 4 does not apply.

Having adverted to this important distinction, I shall now refer to the group consisting of Ss. 2, 3 and 6. S. 2 says that if it appears to the Court that for certain reasons selling the property is more beneficial than dividing it by metes and bounds, the Court, on the request of shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds. Then comes the question, who can claim the benefit of S. 3 ? It expressly enacts that when the request mentioned in S. 2 proceeds from a certain party, some shareholder other than that party may apply under S. 3. It is difficult to understand why the rule has been so enacted. *Coutts-Trotter, J.* refers to "the practical inconvenience, almost the absurdity of the results" following from such rule: see *Original Suit No. 750 of 1919 on the file of the High Court*. In *Ramprasad v. Mukandi* (1), the learned Judges rightly point out that the effect of this section is to favour the smaller shareholder at the expense of the larger. The fact of a person owning a large share, is by this section made a disability and he is precluded from offering to buy the interest of the party owning the smaller share. For instance, if A owns nine-tenths and B one-tenth of an item, the section regards A as being a person under disability although if, of the two persons, one should be favoured, A would appear to

(1) *A. I. R. 1929 All. 443=116 I. C. 851.*

have a much better claim than B. But strangely, the section enacts quite the contrary. The Courts naturally, whenever possible, strove to avoid this result. For instance, it has been held that an application under S. 3 is too late, if made after the sale has been ordered under S. 2: see *Angamuthu v. Ratna* (2), which reverses the decision of Coutts-Trotter, J., already referred to. Again where a plaintiff owning two-thirds share offered to buy up the share of the defendant on payment of a stated sum, it was held that this was not a request strictly falling within S. 2 and therefore the terms of S. 3 did not come into play at all: *Ramprasad v. Mukandi* (1). What S. 3 contemplates is a request by a party for the sale of the whole property.

In the case just cited, the party applied not that the whole property should be sold but that his cosharer's interest might be sold to him at a valuation. These two cases show how strictly Ss. 2 and 3 have been construed. In my opinion, the rulings, with great respect, are perfectly correct. I may remark in passing, that in *Angamuthu v. Ratna* (2), the learned Judges overlooked that the order for sale being one by consent, cannot rightly be described as one covered by S. 2. It seems to me, with great deference, that the judgment would have been more correct (though the result would not have been different) had the sale been deemed as one falling entirely outside the Partition Act. In the other case mentioned above, viz., *Ramprasad v. Mukandi* (1), the learned Judges finding that the application did not conform to the provisions of S. 2, held, as I have just observed (and in my opinion rightly) that the Partition Act did not apply. It is well to bear in mind in this connexion that independent of the Partition Act, the Court has an inherent power to refuse to divide a property by metes and bounds and to adopt such other means as may appear equitable, for effecting a just partition: *Basantakumar v. Moti Lal* (3).

Then the question arises, if a sale is directed under S. 2 and S. 3 does not apply, what is the position? The sale is nevertheless one governed by the Par-

tion Act and S. 6 relates to such a sale. Cl. 3 of that section runs thus:

"If two or more persons, of whom one is a shareholder in the property, respectively advance the same sum at any bidding at such a sale, such bidding shall be deemed to be the bidding of the shareholder."

Incidentally, this shows beyond all doubt that shareholders and strangers alike may bid at the sale: see *Angamuthu v. Ratna* (2) at p. 925 (of 48 Mad.)

To elucidate the points to which I have referred, I may notice three further cases cited at the Bar. In *Atul Chandra v. Bhusan Chandra* (4), the plaintiff was the 14-annas sharer and the defendant, the 2-annas residue cosharer. The plaintiff applied that he might be allowed to buy up the defendant's share at a valuation, or, in the alternative, that the property might be sold to the highest bidder and the proceeds distributed. The defendant thereupon asked under S. 3 for leave to buy at a valuation the plaintiff's share. The question arose as to who could apply under the lastmentioned section, the plaintiff or the defendant. The Court rightly held, reversing the judgment of the District Judge, that the defendant had the right. But with respect, the decision seems on another point to be wrong. The plaintiff's application was not of the kind contemplated by S. 2 and it should have been held that the Partition Act did not apply to the case. In *Jamnadas v. Mulchand* (5), the plaintiff was interested in two-thirds of the property and applied for a sale under S. 2. It was held (and this is correct) that the right to buy out was vested under S. 3 in the defendant. Having held this, the Court directed the property to be sold but added by way of a rider, that the defendant's right was unaffected to apply under S. 3 to buy up the plaintiff's share at a valuation. This is the comment I wish to make on this case. Either the defendant applied before or after the sale was directed under S. 2. If before, he possessed the right, if after, he was too late. But the learned Judge ordered a sale, which of course would have been right had the defendant not applied; but, at the same time, the Judge gave him leave to buy out, which presupposes that he made a valid application. In *Mahabir v. Mahadev*, A. I. R. 1927 All. 686, the plaintiffs owned

(2) A. I. R. 1925 Mad. 1234=91 I. C. 516=48 Mad. 920.

(3) [1911] 11 I. C. 370.

(4) A. I. R. 1926 Cal. 1190=97 I. C. 690.

(5) [1914] 7 S. L. R. 117=24 I. C. 273.

two-sevenths and the defendants five-sevenths of a certain house. The latter applied under S. 2. The former thereupon made a request under S. 3. The learned Judge, having stated these facts, observes:

"It becomes imperative on the Courts below to follow the procedure enjoined by S. 3, Cl. 2, Partition Act."

This is intelligible only upon the footing that disputes arose among the plaintiffs inter se as otherwise Cl. 2 could have no operation: see *Angamuthu v. Ratna* (2).

Now, let me deal with the facts of the present case: judged by these principles, the terms of the defendants' request do not fulfil the requirements of S. 2. The lower Courts ought therefore to have held that the Partition Act does not apply. Let us grant that their request was a valid one. Even then, the Courts below ought not to have given them leave to buy up the plaintiff's share, for the right to buy out (if it did exist) would vest in the latter and not in the defendants. But as a matter of fact the plaintiff did not apply under S. 3. Even granting therefore that the action of the lower Courts was otherwise justifiable, the only order they could have made was one under S. 6. Moreover, the Courts below entirely ignored the distinction that exists between the items which form the dwelling house and the other items in the suit. They applied the same rule to both sets of properties. In every respect, they thus disregarded the provisions of the Partition Act. His Lordship then dealt separately with each of the items to which the two suits related and disallowed the objections.

Judgment.—I must disallow the objections. As regards Re-survey No. 331, the plaintiff gave the extent as 4 acres 64 cents and this was not disputed. These measurements were also adopted in the order passed by this Court calling for a finding. Next as regards the valuation of the dwelling house, I see no reason to differ from the estimate of the District Munsif. There is no point in the objection raised in regard to mesne profits. As to costs, those that have been incurred up to the date of the order calling for a finding were provided for in that order and as to subsequent costs, I make no order except that the remuneration payable or paid to the commis-

sioner, shall be borne in two equal moieties, half by the plaintiff and half by the defendants.

P.R.S./K.N.

Order accordingly.

A. I. R. 1932 Madras 18

MADHAVAN NAIR, J.

Somanatha Swayi and others—Plaintiffs—Appellants.

v.

Karji Ananta Patnaik and others—Defendants—Respondents.

Second Appeal No. 571 of 1928, Decided on 27th July 1931, against decree of Dist. Judge, Ganjam, in A. S. No. 37 of 1926.

Transfer of Property Act (1882), S. 60, Exception — Where mortgage is split as mortgagee owning part of mortgage, mortgagee can claim only proportionate amount of mortgage money.

The plaintiffs were the mortgagees of property consisting of four items. Items 3 and 4 had come into possession of the plaintiffs. The plaintiffs sought to recover the whole of the mortgage amount from item 1 alone:

Held: that under the circumstances of the case the plaintiffs mortgagees according to their own statement having become the owners of items 3 and 4, under the exception to S. 60 the mortgage was split up, and therefore the mortgagee was entitled to claim only a proportionate amount of the mortgage money. Therefore the plaintiffs could recover only so much of the mortgage debt as bore the same proportion to the whole of the mortgage as the value of item 1 bore to the value of the whole of the property: 40 *Mad.* 968, *Dist.*; 31 *Mad.* 419, *Rel. on.*; A. I. R. 1931 *Mad.* 552, *Ref.*

[P 19 C 1]

C. S. Venkatachariar—for Appellants.

T. M. Ramaswami Ayyar—for Respondents.

Judgment.—The plaintiffs are the appellants and mortgagees of property consisting of four items. The first item has been subsequently sold to defendant 3, the contesting respondent in the case. Items 3 and 4 have come into the possession of the plaintiffs according to their own case. In the lower Court the plaintiffs sought to recover the mortgage amount which was calculated at Rs. 250 from item 1 alone. The lower Court gave a decree against items 1, 3 and 4 with a direction that items 3 and 4 will be proceeded against first.

In second appeal Mr. Venkatachariar argues that the plaintiffs are entitled to get a decree against item 1 alone they having the right to exonerate the other items in the suit. It was held by a Full Bench in *Perumal Pillai v. Ramanchet-*

tiar (1) that a mortgagee voluntarily releasing from the suit a portion of the mortgaged property is not bound to abate a proportionate part of the debt and is entitled to recover the whole of the mortgage amount from any portion of the mortgaged property. This decision supports the contention urged by the appellant's learned advocate. But it is argued by Mr Ramaswami Ayyar, the learned advocate for the respondents, that full effect should not be given to this decision in this particular case having regard to the fact that the plaintiffs-mortgagees according to their own statement have become the owners of items 3 and 4. Under this exception to S. 60, T. P. Act, the mortgage having been split the mortgagee is entitled to claim only a proportionate amount of the mortgage money. Authority for this position may be found in *Appayya v. Rangayya* (2) at p. 424: see also *G. Brahmayya v. P. Subbarayudu* (3). Applying the principle enunciated in these cases the plaintiffs can recover only so much of the mortgage debt as bears the same proportion to the whole of the mortgage as the value of item 1 bears to the value of the whole of the property. Before they get a decree the exact amount that they will be entitled to on this principle will have to be determined by the lower Court. If the amount is above Rs. 250 they can get a decree only for Rs. 250. If it is less, of course, they will be entitled only to that less amount.

The result is that the decree of the lower appellate Court is set aside and the appeal is remanded to the lower Court for passing a decree in favour of the plaintiffs against item 1 in accordance with the directions given in this judgment. The appellants will be entitled to their costs throughout.

In conclusion I must say that I am much obliged to Mr. Ramaswami Ayyar who at my request argued the case on behalf of the respondents who are unrepresented. He has argued it with great ability and his arguments have been of considerable help in deciding the second appeal.

P.R.S./B.V.

Case remanded.

(1) [1917] 40 Mad. 968=42 I. C. 352 (F.B.).

(2) [1908] 31 Mad. 419=18 M. L. J. 229.

(3) A. I. R. 1931 Mad. 552=131 C. 152.

* A. I. R. 1932 Madras 19

JACKSON, J.

Chinna Vel Naick—Appellant.

v.

Venkatarama Naick and another—Respondents.

Appeal No. 60 of 1930, Decided on 31st March 1931, from order of Sub-Judge, Ramnad, D/- 12th February 1930, in Appeal Suit No. 69 of 1929.

(a) Limitation Act—Interpretation.

In construing the statute of limitation it is a recognized practice not to read into it more than it contains. [P 20 C 1]

(b) Limitation Act (1908), Art. 182—Application to bring legal representatives on record is step-in-aid of execution.

The article seems to be framed precisely in order to admit a case where the decree-holder has put in an application in accordance with law to the proper Court to bring on legal representatives as a step-in-aid to execution: *A. I. R. 1924 Mad. 906*; *16 I. C. 807*; *39 I. C. 950* and *24 Cal. 778, Ref.* [P 20 C 2]

* (c) Limitation Act (1908), Art. 182—Application for execution on ground of oral assignment of decree and also for bringing judgment-debtor's legal representatives on record—Latter part forms step-in-aid and saves limitation although execution application be invalid.

Where a decree-holder has put in an execution application on basis of an oral assignment of the decree from another decree-holder in the same suit and also for bringing the legal representatives of the judgment-debtor on record the Court has not to consider firstly whether the execution application is valid or not. The Court should firstly consider whether the latter part asking for the legal representatives to be brought on record amounts to a step-in-aid of execution, and if that is according to law the prayer for execution does not matter; *24 Cal. 778, Rel. on.* [P 21 C 1]

K. Rajah Ayyar—for Appellant.

V. K. John and S. Nataraja Nadar—for Respondents.

Judgment.—The sole point for determination in this second appeal is whether E. P. No. 522 of 1927 is an application in accordance with law to the proper Court for execution or to take some step-in-aid of execution. The facts leading up to this essential point are stated by the District Munsif in his fourth paragraph.

The application is to bring on to the record the heir of plaintiff 2, and the legal representatives of defendant 1, and then to realize the decree on behalf of plaintiff 1. Apparently it was alleged in the body of the application that the first had obtained an oral transfer of the right of plaintiff 2, and since decrees cannot be orally transferred the execution

petition was finally dismissed as invalid. It is therefore argued by the appellant that there was no application in accordance with law. But it must be noted that apart from the transfer plaintiff 1 had his own right under the decree and was entitled to apply to the proper Court to have the necessary legal representatives brought on to record. So far the application is in accordance with law, and the bringing on of these legal representatives was a step-in-aid of execution. It is argued however that this bringing on would only be a step-in-aid of execution, in so far as it is a step-in-aid of the application for execution which was invalid, as though the article ran, an application in accordance with law for execution or to take some step-in-aid of the aforesaid application for execution in accordance with law. The article does not run in that way, and in construing the statute of limitation it is a recognized practice not to read into it more than it contains. I should hold therefore that the lower appellate Court has rightly decided the matter.

It remains to see whether this view is shaken by the relevant case-law.

The appellant relies upon *Arunachalam Chettiar v. Latchumanan Chettiar* (1), where it is laid down that an execution petition cannot be a step-in-aid of itself. As far as that goes it seems to be rather against the appellant's argument that the step-in-aid of bringing on legal representatives was exclusively a step-in-aid of this very petition. It was a step which aided the execution as a whole.

Ramanathan Chettiar v. Ragavendra Row (2), lays down what no one disputes that an oral assignment is invalid. The only way the respondent seeks to justify E. P. No. 522 is that it contains the prayer to bring on legal representatives.

Kailasa Pandaram v. Ramanuja Naidu (3) is another case of an admittedly invalid application, not because of oral transfer, but because of transfer of a minor's interest without the Court's consent.

The respondent relies upon *Adhar Chandra Das v. Lal Mohan Das* (4).

There the decree-holder was seeking to execute an attached decree, and as in the present case also sought to bring on legal representatives. The Court held that the execution of an attached decree was not necessarily unlawful (anticipating O. 21, R. 53) and also held (p. 780) in regard to that part of the application which asked for the substitution of the heirs of the judgment-debtor in place of the judgment-debtor that without bringing them before the Court the judgment-creditor could not have proceeded with his execution proceedings:

"His application for that purpose appears to me to be a step-in-aid of execution in accordance with law."

Mr. Rajah Aiyar argues that MacLean, C. J., would never have written in these terms unless he has first found that the application to execute an attached decree was valid. I do not think so. The learned Chief Justice is evidently considering the application as of a double nature in two parts. He is prepared to hold that the part, praying for execution of an attached decree is lawful; but even if it were not, and the application were disallowed, still the part of it, which seeks to bring on legal representatives, is none the less a step-in-aid of execution. This is brought out in the head-note. Banerjee, J. puts the matter more clearly. Granting, he says on p. 782 that the application was not merely an application for execution, but contained a further prayer for the substitution of the legal representatives of the deceased judgment-debtor in his place an incidental step which was a necessary step for the execution of the decree. That is clearly against the appellant's present contention. Moreover, if the only application that can save the bar of limitation is an effective application for execution, there is no apparent reason for the alternative "or to take some step-in-aid of execution" being inserted in the article. The article seems to be framed precisely in order to admit a case like the one under consideration where the decree-holder has put in an application in accordance with law to the proper Court to bring on legal representatives as a step-in-aid to execution. It is idle for the appellant to contend that the Court must disregard the application to take a step, and must look only to the application for execution when the statute in terms requires

(1) A. I. R. 1924 Mad. 906=82 I. C. 497.

(2) [1912] 16 I. C. 807.

(3) [1917] 39 I. C. 950.

(4) [1897] 24 Cal. 778=1 C. W. N. 676.

the Court to consider this alternative application to take some step-in-aid.

Put concisely, the appellant's view is, the application for execution must first be considered, and if that is contrary to law, nothing more need be looked at; while the view of the respondent is, consider the application to take a step-in-aid and if that is according to law, the further prayer for execution does not matter.

Agreeing with the latter view, I dismiss the appeal with costs.

P.R.S./B.V.

Appeal dismissed.

* A. I. R. 1932 Madras 21

WALLER AND PANDALAI, JJ.

Venkatachala Goundan and others—
Accused.

v.

Emperor—Opposite Party.

Criminal Ref. No. 4 of 1931, Decided on 18th September 1931, by Sess. Judge, Trichinopoly, in Case No. 25 of 1931.

(a) Interpretation of Statutes—Language of statute should be interpreted as it stands.

The proper method of construction of a Statute is to interpret its language as it stands uninfluenced by considerations of what the law may be elsewhere. [P 21 C 2]

* (b) Criminal P. C. (1898), S. 307.—High Court has only to see whether opinion of Judge, that verdict by jury is manifestly wrong, is supported by evidence.

On the assumption that Sessions Judge will not make references unless he thinks, that the verdicts are manifestly wrong, the duty of the High Court in dealing with the references is confined to considering whether the opinion of the Judge is supported by evidence. [P 22 C 1]

Per Waller, J.—Some of the observations in A. I. R. 1928 Mad. 1186 should not be construed in such a manner as to limit the discretion of the High Court in disposing of the references. [P 24 C 1]

Per Pandalai, J.—There is nothing in A. I. R. 1928 Mad. 1186, which does violence to the language of S. 307 nor anything which is either inconvenient or unsuitable to Indian conditions. The discretion of the High Court in disposing of references is by no means unlimited: A. I. R. 1928 Mad. 1186, Disc. and Rel. on. [P 24 C 1]

V. L. Ethiraj and K. Aravamuda Ayyangar—for Accused.

Public Prosecutor—for the Crown.

Waller, J.—This is a reference under S. 307, Criminal P. C. Fifteen persons were charged before the Sessions Judge, Trichinopoly, with dacoity. The jury

acquitted one of them and convicted the rest. The Judge thought that acceptance of their verdict would involve a grave miscarriage of justice and has recommended that it be set aside. A Full Bench of this Court has in *Veerappa Goundan v. Emperor* (1), held that the jury is primarily the tribunal to find the facts and that it is not for the High Court to interfere with the verdict of a jury unless it is unreasonable. Mr. Ethiraj has pressed us most urgently not to put too narrow a construction on this ruling. It is not, of course, for us to criticize it, but I think it advisable to correct two statements made in the course of the judgment of the learned Chief Justice. The first is that the rule laid down in *Solomon v. Bitton* (2)

"is enshrined in an even more definite form in the Indian statute, so far as appeals are concerned."

It is not. *Solomon v. Bitton* (2) was a case of an application for a new trial on the ground that the verdict was against the weight of evidence. In India, there is no appeal on the facts, but only on points of law. The second is that the Calcutta High Court has inclined preponderantly to what may be described as the English view. That is no longer correct. The latest Calcutta case on the point is *Emperor v. Ramchandra Roy* (3), Cuming, J., observed that the decisions "seemed to vary from the extreme view that the High Court should be very reluctant to interfere with a verdict of a jury to the view that the High Court in dealing with those references is to be guided by the plain words of the Code" and then went on to say:

"Speaking for myself, I have always thought that I am upon far firmer ground, if I adhere to the strict words of the Code and do not attempt to interpret the Code in the light of the practice in other countries where the law and conditions are different."

That is, of course, the proper method of construction, as their Lordships of the Judicial Committee have pointed out more than once, to interpret the language of the statute as it stands, uninfluenced by considerations of what the law may be elsewhere.

Now what is the rule that has been propounded in *Veerappa Goundan v. Emperor* (1). It is this. On the assumption

(1) A. I. R. 1928 Mad. 1186=114 I. C. 353=51 Mad. 956.

(2) [1831] 8 Q. B. D. 176.

(3) A. I. R. 1928 Cal. 732=111 I. C. 327=55 Cal. 879.

(which is, I may remark, entirely justified) that Sessions Judges will not make references unless they think that the verdicts are manifestly wrong, the duty of the High Court, in dealing with such a reference, is confined to considering whether the opinion of the Judge is supported by the evidence. To the rule so stated no exception can be taken, but I venture to express a hope that some of the observations in the judgment will not be construed in such a manner as to limit the discretion of the High Court in disposing of these references. All Judges of mufassil experience realize how important it is that the High Court should not allow itself to be influenced by a sort of conventional respect for the verdict of a jury. The weaknesses and peculiarities of jurors and assessors are notorious. They will acquit or find extenuating circumstances in the clearest cases of murder; in cases of dacoity, they are far too ready to convict. It is scarcely too much to say that a Maraver charged with dacoity before a Tinnevely jury has a very slender chance of being acquitted. Another reference has just been argued before us from that district, in which a large number of Maravers have been convicted of dacoity despite the strenuous efforts of the Judge to secure their acquittal. I have had myself to reject appeal after appeal on the ground that no questions of law were involved, although I felt that the verdicts were clearly wrong and that the Judges ought to have made references under S. 307.

In this instance, the Sessions Judge is of opinion that the verdict is plainly unjust and I think that, on the evidence, he is right. The Public Prosecutor concedes that there are some curious features about the case and that the best that can be said of it is that it is on the borderline. Briefly the facts alleged are these. The first two accused owed P. W. 18 a considerable sum of money. He sued them and got a decree on a compromise by which the balance of that sum was to be paid in two equal annual instalments; the first of which became payable on 4th August 1930. An offer was made by the debtors to give two pairs of bullocks and a cart in part payment and to deposit the balance in cash. P. W. 10, P. W. 18's son, accordingly went to the village on 9th August accompanied by P. Ws. 11 to 15. The bullocks were inspected by

P. Ws. 11 and 12, who said that they were not worth as much as the debtors thought. They were at once assaulted and the other witnesses tried to escape. They were overtaken however and brought back. Pen, ink and paper were produced and accused 1 ordered P. W. 10 to write out a receipt. P. W. 10 refused, whereupon accused 1 drew a sword and threatened to cut him. P. W. 10 then wrote a receipt for the whole sum due minus a certain rebate and accused 1 took it. An alarm was raised and the accused made off. The receipt in question is Ex. E and it is dated 24th July.

It is in a perfectly clear and steady hand and certainly was not written under the circumstances alleged by P. W. 10. His story is, in this respect, quite preposterous. His hand was, he says, so shaky as the result of the treatment he had received that he was, at first, unable to write properly. When, however accused 1 threatened to cut him, his hand recovered its steadiness and he was able to write. If his nerve was so shaken by a slight assault, a threat to murder him would scarcely have restored it. This goes to the root of the case. If it is obvious that the receipt could not have been written under the circumstances alleged, the whole story goes. It is certain that something happened and possible that no money passed and that the receipt was got hold of by unfair means. As the Sessions Judge observes, there is no smoke without a fire and it was probably on that ground that the jury convicted. The manner in which the accused, most of whom were unknown to the witnesses, were identified was farcical. The identification was made in the presence of a police officer alone after nightfall by the aid of a hurricane lantern. The names of the accused had been supplied by P. W. 16 and it is impossible to attach any value to an identification so conducted. The presence of P. W. 16 is one of the most suspicious features in the case. Among the accused are several Pallars.

The prosecution case appears to have been that four of them were in accused 1's service and the rest were brought in for the purpose of helping him. The evidence of P. W. 16, who is very obviously on bad terms with all the accused, makes several things perfectly clear. One is that none of the Pallars was in the service of accused 1; another that, if

any Pallars were present, they would not have been helping the Goundens, but opposing them. Some time ago the wife of P. W. 16's first cousin P. W. 17 eloped with a Pallan. She was outcasted and the Goundens dismissed all the Pallars who were working for them. That being so, it is most unlikely that any Pallar would have come to help accused 1. When P. W. 10 made his complaint to the police, he mentioned P. W. 16 as the man who could name all the accused Goundens as well as Pallars. Apparently he had arranged with the witness that he should give evidence against his enemies the Goundens and implicate the Pallars whom he and P. W. 17 hated. It seems to me practically certain that the Pallar accused have been falsely implicated. With that finding goes another large part of the story. It is unnecessary to say any more. It is quite likely that something improper has been done in relation to Ex. E, but I do not believe the story of extortion told by P. W. 10 and his witnesses. I would accept the reference, set aside the verdict and acquit the accused.

Pandalai, J. — I think the verdict should be set aside and the accused acquitted on the ground that the story of dacoity told about the preparation and handing over of the receipt Ex. E is so unreasonable that no jury should have accepted it. An examination of the document shows that it was written in a firm hand in the writer's usual style with nothing to show that it was not prepared at leisure and at ease. No man of prudence will accept the story that it was prepared at midday while the writer was exposed to the sun in a field as a result of violence or threat of violence. But in my opinion the accused had only themselves to thank for the view the jury took of their conduct. They asked the jury to accept the view that the receipt was prepared in the complainant's village in Telungapatti on 24th July and obtained by accused 1 on payment to P. W. 10 Govindasami Chetty of Rs. 2500 in cash. This was, if possible, still more absurd than the story of the dacoity. I believe myself that the receipt at Villai-parapatti the village of accused 1 on 9th August, P. W. 10 having been lured there on promise of payment and that it was obtained from P. W. 10 by the accused by some trickery and without paying

money. P. W. 10 and his companions thus outwitted in a village where they could get no help, went away and sent for P. W. 10's father and as a result of consultation lodged a case of dacoity. We are not concerned with the effect of the receipt in the civil Court where the petition for satisfaction of the decree filed by the accused is pending. But I agree that the accused should be acquitted.

I guard myself against saying anything to cast doubt on the reasoning or result of the decision in *Veerappa Goundan v. Emperor* (1) not only because it is binding on this Bench and I have to follow and apply it even if I did not agree with it, but also because I see no reason to doubt its soundness. Two propositions are involved in that decision. The first, which is assumed for the purpose of the decision, is that a reference should be made by a Sessions Judge under S. 307 only in cases where in his view the verdict of the jury is perverse, unreasonable or altogether against the weight of evidence. The second, which is expressly decided, is that on a reference under S. 307, High Court will not retry the case as if there had been no trial but will confine itself to the question whether the Judge's opinion of the verdict, i. e., that it was perverse or unreasonable or altogether against the weight of evidence is correct. If it was correct the jury's verdict will be set aside but if it was not, the verdict will stand, even if it be one which the Court if it had to decide the case for itself in the first instance will not arrive at. In short, the jury's verdict will be given by the High Court the same weight (the "due weight" spoken of in S. 307) which the trying Judge should have given to it, and the Judge's opinion will be given by the High Court the weight (the "due weight" spoken of in S. 307) which it should have as that of the presiding officer of the Court to whom is entrusted the duty of seeing that justice does not suffer by the forms of law. In other words the High Court will give to each branch of the Court the weight which is due to it when acting within its own function and will see that neither encroaches on the function of the other. The jury's verdict will be upheld within the possible differences of opinion of reasonable men on the same evidence, but not beyond. The Judge's disagree-

ment with the jury will be affirmed only when it is based on the jury having given a verdict which, being perverse, unreasonable or against the weight of the evidence, should not have been given. Understood in this way I can see nothing in *Veerappa Goundan v. Emperor* (1) which does violence to the language of S. 307 nor anything which is either inconvenient or unsuitable to Indian conditions.

I understand my learned brother as not disapproving of the limit necessarily set on the powers of the Sessions Judge's reference by the requirement that he ought not to refer a case unless he considers the verdict manifestly wrong nor on the powers of the High Court by the requirement that it is confined to considering whether the opinion of the Judge as to verdict being manifestly wrong, is supported by the evidence. If so, I respectfully think that the discretion of this Court in disposing of these references is by no means unlimited and that is all the Full Bench decision means. I agree to the order proposed.

P.R.S./R.M.

Verdict set aside.

A. I. R. 1932 Madras 24

JACKSON, J.

Kodangi—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 370 of 1931, Decided on 22nd September 1931, against order of Asst Sess. Judge, Madura, in Case No. 56 of 1931.

(a) Evidence Act (1872), S. 25—Accused charged with offence under S. 211, I. P. C.—Statement of Police Officer that accused confessed having sent false incriminatory telegram cannot be proved.

Section 25 is absolute. Where a person is charged under S. 211, I. P. C., with having sent a telegram charging certain persons with murder, knowing such charge to be false and there is no proof that the accused sent the incriminatory telegram, beyond a police officer's statement that he confessed to so doing, the statement is within the mischief of S. 25 and cannot be proved. [P 24 C 2]

(b) Penal Code (1860), S. 211—Statements in course of investigation under Chap. 14, Criminal P. C., are not charges.

The statements made in the course of an investigation under Chap. 14, Criminal P. C., are not charges as contemplated by S. 211, I. P. C. : 31 Mad. 506, *Foll.* [P 24 C 2]

K. S. Jayarama Ayyar and *G. Gopala-swami*—for Appellant.

Public Prosecutor—for the Crown.

Judgment.—The appellant has been sentenced to five years rigorous imprisonment for instituting criminal proceedings before the Madura police charging certain persons with murder and knowing such charge to be false—the offence under S. 211, I. P. C.

It would have been better if the charge had exactly specified how he instituted these proceedings.

Apparently he is charged on two counts. Firstly he sent a telegram to the District Superintendent of Police, Madura, to the effect that these persons stabbed Tirumeni Servai, and secondly, that during the investigation under S. 174, Criminal P. C., he made a statement to the same effect.

There is no proof that the appellant sent the incriminatory telegram, beyond the Circle Inspector's statement that he confessed to so doing. This statement is within the mischief of S. 25, Evidence Act, and should not have been proved. No doubt it is one of the ridiculous anomalies involved in these sections, but the law is quite clear. Mr. Bewes argues that the confession in S. 25 must be a confession of the crime which the police officer is at the moment investigating and otherwise it is provable, which is obvious common sense, but unfortunately not law. S. 25 is absolute. If A says to a police officer : "I noticed B murdering X while I was murdering Z," his confession that he murdered Z cannot be proved.

No doubt the appellant admits that he sent the telegram, but the prosecution cannot rely upon his admission without other proof, and even if it could so rely, would be bound to take the admission as a whole. The appellant says that he is illiterate and ignorant of English, and what was telegraphed is not what he told the writer.

Then it is sought to fortify the charge by proving what the appellant said at the inquest. It has always been held that statements made in the course of an investigation under Chap. 14, Criminal P. C., are not "charges" as contemplated by S. 211: cf. *Chenna Malli Gowda v. Emperor* (1) and *Chinna Ramana Gowd v. Emperor* (2). It would make criminal investigation very difficult if any person who gave voice to a suspicion were liable to criminal prosecution.

(1) [1904] 27 Mad. 129=1 Weir 193.

(2) [1908] 31 Mad. 506.

For the above reasons the conviction cannot be upheld. The appellant is acquitted.

P.R.S./R.M. *Conviction set aside.*

A. I. R. 1932 Madras 25 (1)

WALLER AND PANDALAI, JJ.

(Kota) Potharaju—Prisoner — Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 299 of 1931, Decided on 3rd September 1931, against order of Sess. Judge, Kistna Division, in Case No. 4 of 1931.

Penal Code (1860), S. 300, Excep. 1, and S. 304—Provocation—Question of provocation is purely psychological question.

The question of provocation is a purely psychological question and one cannot apply considerations of social morality to such a purely psychological question. Consequently where a man sees a woman in the arms of another, and loses control over himself, the circumstance that she was his mistress and not wife does not make any real difference for the purposes of S. 304. [P 25 C 2]

Public Prosecutor—for the Crown.

Judgment.—Two questions arise in this appeal. The first is what offence has been committed; the second, what the sentence should be. The appellant does not deny that he killed his mistress a woman called Mahalakshmi, but he pleads that he did so in consequence of grave and sudden provocation. The Judge has found that he discovered the woman in the arms of a former lover (P. W. 17), lost control of himself and stabbed her. The finding is probably correct. P. W. 17 admitted to the police that he was seated on Mahalakshmi's cot when the appellant entered the hut but not that she was in his arms. As he admitted further that she had solicited him, it is difficult to believe his pretence that he had refused her advances. On this finding, the Judge came to the conclusion that the offence committed was one under S. 302, I. P. C. He was of opinion that though the provocation was sudden it was not so grave as to justify him in convicting of culpable homicide not amounting to murder. This opinion he based on the fact that Mahalakshmi was the appellant's mistress. Had she been his wife, his conclusion would have been different and more favourable to the appellant. We find it impossible to agree that the fact that Mahalakshmi was the appellant's

mistress and not his wife, makes any real difference. One cannot supply considerations of social morality to a purely psychological problem. The question is not whether the appellant ought to have exercised, but whether he lost control over himself. When a man sees a woman be she his wife or his mistress, in the arms of another man, he does not stop to consider whether he has or has not the right to insist on exclusive possession of her person as the case cited by the Judge puts it. She is a woman, of whose person he desires to be in exclusive possession and that is for the moment, enough for him, he thinks of nothing else. The question in each particular case is whether the circumstances are such as to justify the Court in giving the accused the benefit of the exception. In the present instance we should have altered the conviction to one under S. 304, I. P. C., but for two circumstances. It is in evidence that after P. W. 17 had escaped the appellant fastened the door of the hut and he admits himself that having no knife in his hands he removed some baskets from the top of his box, opened it and took out the knife with which he committed the murder. All this must have taken some time and indicates a certain amount of preparation for an intended murder. Had he taken a knife from his belt and used it at once, it would have been a different matter. As it is, we think that he has been rightly convicted and sentenced. The conviction and sentence are confirmed and the appeal is dismissed.

P.R.S./V.B. *Appeal dismissed.*

A. I. R. 1932 Madras 25 (2)

LAKSHMANA RAO, J.

Emperor

v.

Varadarajulu Naidu—Accused.

Criminal Revision Case No. 354 of 1931 (Case Referred No. 27 of 1931), Decided on 13th August 1931, Case Referred by Sess. Judge, West Tanjore, in his letter, D/- 26th February 1931.

Criminal P. C. (1898), S. 245—Acquittal under S. 245 without recording evidence is illegal.

The acquittal of accused under S. 245 without recording any evidence is illegal. It is not open to a Magistrate to refuse to examine the complainant and witnesses produced by him.

[P 25 C 1]

Public Prosecutor—for the Crown.

R. Gopalaswami Ayyangar — for Accused.

Order.—It was not open to the Magistrate to refuse to examine the complainant and the witnesses produced by her and the acquittal of the accused under S. 245, Criminal P. C., without recording any evidence is clearly illegal. It cannot therefore be upheld and the recommendation of the Sessions Judge who has referred the case to this Court on the application of the complainant is accepted. The order of acquittal is therefore set aside and the complaint should be inquired into by such other Magistrate as the District Magistrate of Tanjore may direct.

P.R.S./R.M.

Acquittal set aside.

A. I. R. 1932 Madras 26

BEASLEY, C. J. AND CORNISH, J.

Sathappa Chettiar—Petitioner.

v.

C. Ramachandra Naidu — Opposite Party.

Criminal Misc. Petn. No. 638 of 1931,
Decided on 14th September 1931.

Contempt of Court—Essence of—Atmosphere of prejudice must be created.

The essence of the offence is conduct calculated to produce so to speak, an atmosphere of prejudice in the midst of which the proceedings must go on. Publications of that character have been punished over and over again as contempts of Court, where the legal proceedings pending did not involve trial by jury and where no one would imagine that the mind of the Magistrates or Judges charged with the case would or could be induced thereby to swerve from the straight course: (1902) 1 K. B. 77, *Foll.* [P 27 C 2]

Nugent Grant and *T. M. Kasturi*—for Petitioner.

N. Rajagopalan—for Opposite Party.

Beasley, C. J.—The respondent here is the Editor and Publisher of the "Tamil Nadu" newspaper whose place of business is in Broadway, Madras, and he is here today to show cause why he should not be committed for contempt of Court or otherwise dealt with.

The facts of the case can be stated quite briefly and they are as follows: One Sathappa Chettiar at whose instance these proceedings have been put before the Court is an accused person. He stands charged in the Court of the Subdivisional Magistrate of Coimbatore with the offence of criminal breach of trust. He is the Secretary and Banker of the

Kaleswarar Mills Ltd., and amongst other things he has two mills, viz., the Sree Krishna Ginning Factory and the Soma Vilas Ginning Factory under his management. A complaint was presented against him charging him with criminal breach of trust on 1st September in the Court beforementioned. There were three heads of charge—so we gather from the opening of Mr. Nugent Grant—and they were that a certain sum which had been set apart for the payment of bonuses was received wrongly by Sathappa Chettiar, that out of a sum of money which lay in suspense account he set apart Rs. 75,000 in order to misappropriate that sum at some future date and that he was guilty of receiving secret commissions from vendors of cotton.

Immediately after this complaint had been presented in the Subdivisional Magistrate's Court of Coimbatore a search warrant was moved for and obtained and certain mills were searched by the police. Two of them were the Sree Krishna Ginning Factory and the Soma Vilas Ginning Factory which, as before stated, were under his management. On 4th September in the issue of that date of the respondent's newspaper there appeared a report of the criminal charges against Sathappa Chettiar in the Subdivisional Magistrate's Court of Coimbatore. We understand that the report contained an accurate statement of the complaint which was set out in extenso. Had the matter ended there, no proceedings for contempt of Court could have been taken against the respondent and Mr. Nugent Grant does not here rely upon what appeared with regard to that complaint in the respondent's newspaper. He however complains of something which was done by the newspaper on the same date. In the poster or "contents bill" relating to this issuing and in the head lines the matter was dealt with in Tamil in four lines the official translation of which is as follows:

"Sathappa Chettiar in trouble; police search at Tiruppur, thousands of rupees, missing, cotton mills in danger."

Mr. Rajagopalan who appears for the respondent argues that the correct rendering of that passage is as follows:

"Sathappa Chettiar put to trouble, police search at Tiruppur, thousands of rupees missing cotton mills plight."

and argues that read in that way conduct of the respondent does not

amount to contempt of Court in so far as what he has done is not likely in any way to prejudice the fair trial of Sathappa Chettiar. With regard to the first line, in our view, there is not much difference between the official translation and the interpretation put upon it by the respondent. It called the attention of the public who were invited to read the newspaper to the fact that some trouble or worry had fallen upon Sathappa Chettiar. That by itself of course would not amount to anything but it is linked up with the next line which, in our opinion, clearly shows what those words were intended in the first line to convey to the public. As a result of this criminal complaint Sathappa Chettiar was certainly in trouble and of course those people who read the "contents bill" but had not then read the newspaper would find some indication of the sort of trouble that had been put upon him by the words "police search at Tiruppur." Tiruppur was the place where these two factories which were under the management of Sathappa Chettiar were and there was a search and as result of the search—that is the conclusion to be drawn from the third line—thousands of rupees were found to be missing. As a result of that you get the fourth line that cotton mills were either in danger or in trouble or in a plight it does not matter which construction is put upon the Tamil words.

Taking these four lines together, we are of the opinion that readers of the poster and the head lines would gather that Sathappa Chettiar was in trouble, that the police were connected with the trouble that the trouble he was in, occasioned a search of the mills under his management at Tiruppur and that as a result of that search thousands of rupees were found to be missing which was a disastrous matter for the cotton mills. It is argued here that in the third line, which after all is the most important one, one Tamil letter "ma" meaning "alleged" was accidentally omitted by the compositor and that the line should read "thousands of rupees alleged to be missing." Had the words "alleged" been there, then this matter probably would never have come up before this Court. It is an important omission and we are not going to assume that it was an accidental omission. Even if

it were an accidental omission, we have got to ask ourselves whether that omission, accidental or otherwise, does not convey to the public that as a fact thousands of rupees were missing as a result of the police search at Tiruppur and that Sathappa Chettiar was in trouble with regard to it and in consequence of it. That being so, we have got to consider whether the conduct of the respondent in publishing those lines so worded constitutes a contempt of Court, and we can do no better than to refer to the observations of Lord Alverstone, C. J., in the case of *The King v. Tibbits and Windust* (1) at p. 88 where he says as follows:

"It would indeed be far fetched to infer that the articles would in fact have any effect upon the mind of either Magistrate or Judge."

We may pause here and say that it is not in the least likely that the words complained of would have any effect on the Subdivisional Magistrate of Coimbatore and indeed it is extremely doubtful whether he would ever have seen these words at all:

"but the essence of the offence is conduct calculated to produce, so to speak, an atmosphere of prejudice in the midst of which the proceedings must go on. Publications of that character have been punished over and over again as contempts of Court, where the legal proceedings pending did not involve trial by jury and where no one would imagine that the mind of the Magistrates or Judges charged with the case would or could be induced thereby to swerve from the straight course."

It seems to us that these words are singularly appropriate to this case and it is impossible to say that the conduct complained of is not calculated to produce, so to speak, an atmosphere of prejudice in the midst of which the proceedings must go on. That being so, the respondent is guilty of contempt of Court and the only other matter to be considered is, how is he to be dealt with by us. Whilst we think that it is a serious thing to have omitted the word "alleged" thereby stating it as a fact when it possibly is not that thousands of rupees were missing in the factories, it is a case which does not amount to serious contempt of Court. We think that under the circumstances justice will be done by ordering the respondent to pay the petitioner's costs which we fix at Rs. 250.

P.R.S./K.N. *Order accordingly.*

(1) [1902] 1 K. B. 77=71 L. J. K. B. 4=85 L. T. 521=20 Cox. C. C. 70=50 W. R. 125=66 J. P. 5=18 T. L. R. 49.

A. I. R. 1932 Madras 28

VENKATASUBBA RAO, J.

(Ganugalia) Mallayya—Appellant.

v.

(Gudimetla) Bapi Reddi and another—
Respondents.

Second Appeal No. 470 of 1928, Decided on 9th April 1931, against decree of Sub-Judge, Narasapur, in Appeal Suit No. 69 of 1926.

(a) Hindu Law—Alienation—Daughter—Legal necessity.

A daughter of a Hindu succeeding to his property can alienate it for raising money to perform her son's marriage, her husband (i.e., the boy's father) being too poor to meet the expenses, and such purpose is one of legal necessity: *A. I. R. 1922 P. C. 251; 27 Mad. 300 (F.B.); A. I. R. 1914 Mad. 432 (F.B.); 18 All. 473 and 3 I. C. 77, Ref.; A. I. R. 1926 Mad. 517, Dist.*

[P 30 C2]

(b) Hindu Law—Daughter—Alienation—Court sale in mortgage by limited owner—Nature of debt decides what passes under sale when no record except judgment and sale certificate is available.

Where in a Court sale upon a mortgage by a limited owner, beyond the judgment and the sale certificate nothing is available of the record in the suit, which can throw light on the question whether the limited owner represented the inheritance or not, the nature of the debt decides what passes under the sale. *A. I. R. 1926 Mad. 622 and 34 Mad. 188, Ref.* [P 31 C 1]

M. Appa Rao—for Appellant.

V. Suryanarayana—for Respondents.

Judgment.—The question I have to decide is, whether a daughter of a Hindu succeeding to his property can alienate it for raising money to perform her son's marriage, her husband (i.e. the boy's father) being too poor to meet the expenses.

The facts may be shortly stated. One Pattenna died leaving his widow Atchanna and his daughter Saramma. The property first devolved upon Atchanna and on her death on Saramma. On 19th March 1905, she granted a mortgage, Ex. 14, in favour of one Samaldas. The deed of mortgage was executed not only by Saramma but by her husband Bhadriah and her son Veerachari. Samaldas filed Suit No. 671 of 1906 to enforce his mortgage, impleading to his action as defendants, (1) his mortgagors, (2) Surayya, brother of Veerachari, and (3) the sons of one Kanchiah, the deceased brother of the last mentioned person. A decree was passed against the mortgagors alone (i.e. Saramma, Bhadriah and Veerachari) and the suit was dismissed as against the other defendants. The mortgaged

property was brought to sale in execution of the decree and was purchased in 1911 by one Veerabrahmam, who, in his turn, sold it to defendant 2. Saramma died in 1923 and her sons having predeceased her, defendant 1, her husband's nephew, became on her death, the reversioner entitled to the estate, and he, ignoring the Court sale sold the property to the plaintiff, who has instituted the present suit for the recovery of the item, and his claim is resisted by the appellant, defendant 2.

The consideration for the mortgage is the discharge of certain debts due under two promissory notes, which had previously been executed by Saramma in favour of Samaldas, the mortgagee. It is unnecessary to trace back these debts to their origin, for the only question that is material is, do the debts represent, as alleged by the defence, amounts borrowed for the marriage of Veerachari? The trial Court has answered this question in the affirmative. It has also held that the purpose for which the mortgage was granted was one binding upon the reversioner. On these two points, the learned Subordinate Judge has come to a conclusion different from that of the trial Court. His decision, in my opinion, cannot be supported.

In deciding the question, whether in fact, moneys were borrowed from Samaldas and whether they were required for the marriage of Veerachari, the learned Subordinate Judge has firstly made some incorrect statements and secondly failed to advert to certain important considerations. For these reasons, I cannot accept his finding, though it is one of fact. The learned Judge says:

"None connected with these two promissory notes were called for the defendants."

This is not correct. The executants were all dead and the only person that could be examined was Samaldas. His evidence was taken and it completely supports the defence. With the money raised from Samaldas on one of the two promissory notes mentioned above, a debt due to one Anharachari, from whom some amount had originally been borrowed for meeting a part of the marriage expenses, was paid off. This Anharachari having died previous to the suit, he could not be examined. The statement made by the Subordinate Judge to which I have referred is therefore in-

correct. The learned Judge then goes on to state:

"There is no independent evidence for the defendants, that any such debts were really contracted to meet the expenses of Veerachari's marriage."

This again is wrong. Both D. W. 2 and D. W. 3 speak to this fact. They are independent witnesses. D. W. 2 is not the present owner of the property and I fail to see why his testimony should not be regarded as that of an independent witness. In any case, the statement of the Subordinate Judge is not correct. Next, the learned Judge seems to forget, that the promissory notes and those which they superseded, were as a fact filed in O. S. No. 671 of 1906, the mortgage suit. There is evidence that they were destroyed and no inference should have been drawn against the defence, from the fact that they were not produced at this trial. Ex. 12 shows that defendant 2 applied for copies of the promissory notes, but was told that they had been destroyed. The Judge also ignores that there is a finding by the Munsif, that in fact Veerachari's marriage was performed by Saramma. The Judge records no finding himself but I am satisfied that the District Munsif's conclusion is correct. Then again, the learned Judge fails to advert to the fact, that after the Court sale in 1911, all the three mortgagors made an attempt to get rid of it, for that has a material bearing on the question, whether there was or was not collusion between the mortgagors and the mortgagee. Mr. V. Suryanarayana, for the respondent, has strenuously contended that the finding is one of fact and I should not interfere with it in second appeal. But for the reasons I have stated, I cannot accept that finding and I agree with the District Munsif, that the mortgage represents a genuine and bona fide transaction and that the moneys were raised for meeting the expenses of Veerachari's marriage.

The District Munsif records a finding, and in my opinion correctly, that Saramma's husband, Bhadriah, was not possessed of sufficient means to enable him to perform the marriage of his son. The lower appellate Court gives no distinct finding on the point. The question of law that arises on these facts is, was the purpose for which the alienation was made, one of legal necessity under the

Hindu law? In *Sardar Singh v. Kunj Bihari Lal* (1), their Lordships of the Judicial Committee observe that the Hindu system recognizes two sets of religious acts. One is in connexion with the actual obsequies of the deceased, and the periodical performance of the obsequial rites prescribed in the Hindu religious law, which are considered as essential for the salvation of the soul of the deceased. The other relates to acts which although not essential or obligatory are still pious and if performed are meritorious and conduce to the spiritual benefit of the deceased. The distinction between these two kinds of acts must be borne in mind; the first, as is pointed out, is essential or obligatory, whereas the second, while not being essential, is simply pious and conduces to the bliss of the deceased's soul. But both these classes of acts are recognized under the Hindu system as religious acts. Trevelyan while considering what constitute proper objects for the alienation by a restricted female owner, mentions the following purpose:

"To provide for the maintenance of dependent members of her family, whom her husband or the other last full owner (as the case may be) was legally or morally bound to support, and for their marriages or other necessary religious ceremonies, on a reasonable scale, having regard to the amount of the property and the position of the family: Trevelyan's Hindu Law, 3rd Edn. p. 522."

In the case where the limited owner is a daughter, does her son, when his father has not the means to perform his marriage, answer this description or not? Surely, he is a dependent member of her family. Again, can there be a doubt that a Hindu, according to accepted notions is morally bound to support, or perform the marriage of, his indigent daughter's son? I stress the word "morally" as the law as stated in the passage quoted above, does not insist that the obligation of the last full owner should be purely legal. The reasoning, which prefers in this connexion, a daughter's daughter to a daughter's son, seems, with all respect, faulty. A daughter's son occupies in the Hindu system and under the Hindu law a special and privileged position. Though a bhinnagotra sapinda, he takes a place as heir, even before parents and other gotraja sapindas. In

(1) A. I. R. 1922 P. C. 261 = 63 I. C. 36 = 49 I. A. 383 = 44 All. 503 (P.C.).

Karuppai Nachiar v. Sankaranarayanan Chetty (2), ancient texts are quoted to show the peculiar place a daughter's son occupies in the older Hindu law. According to Vishnu :

"If a man have neither son, nor son's son, nor (wife nor female) issue, the daughter's son shall take his wealth. For in regard to the obsequies of ancestors, daughter's sons are considered as son's sons."

Manu declares, that by a male child whom a daughter produces, the maternal grandfather becomes the grandsire of a son's son. The learned Judges in the case just mentioned, after referring to the very high rank accorded to a daughter's son in the old Hindu law, go on to observe, that even under the present law, his position practically remains unchanged. The statement found in the cases to which I have been referred, that the marriage of a daughter's daughter may, if at all, be considered a proper object and not that of a daughter's son, involves, with great deference, a confusion of thought. Whether from the point of view of a joint Hindu family, the marriage of a boy, as distinguished from a girl, is a family necessity or not, was a question on which there was some difference of opinion till it was decided in the affirmative by *Gopalakrishna v. Venkatanarasu* (3). While dealing with the power of a limited female owner, we are concerned not with any question of family benefit but with what conduces to the spiritual benefit of the deceased male holder. While a daughter's daughter has undoubtedly a special claim a daughter's son, by reason of the privileged position assigned to him in the Hindu system, stands even on a better footing. In *Rustam Singh v. Moti Singh* (4), where the father not being possessed of sufficient means, the mother, in order to raise money to meet the expenses of her daughter's marriage, mortgaged property of her own, which had come to her from her father, it was held that the mortgage was made for legal necessity and was a valid mortgage. This decision was followed by a Bench of our Court in *Chudammal v. Nadamuni Naidu* (5). I am not in the least disposed to question the correctness of these cases ; on the contrary, they lay

down, in my opinion, a rule entirely in harmony with the Hindu law. *Rajagopalachari v. Sami Reddi* (6), a case decided by Devadoss, J., has been relied on by the appellant. I must express, for the reasons I have already given, my most respectful dissent from that ruling. The actual decision in the case I may state has been set aside on appeal though on a different ground. I may further point out that the learned Judge rests his conclusion, even granting that it is otherwise correct, on an older view, which has been declared to be wrong by a Full Bench in *Gopalakrishnan v. Venkatanarasu* (3), as case evidently not brought to his notice. Mr. Suryanarayana also relied upon a case decided by Anantakrishna Ayyar, J. : *L. Ananda Rao v. Venkatasubba Rao* (7). The alienor there was the widow, and not the daughter, of the last male holder, but that makes no difference. Further, there was a finding, that the boy's father was possessed of sufficient means, and although the case may be distinguished on that ground, I feel bound to express my most respectful dissent from the principle underlying that judgment. Firstly, can it reasonably be said, that the maintenance of a daughter's son is not a proper object ? His father being needy and poor, is the rich mother to allow her son to starve ? Suppose again, that the boy is attacked by a serious disease which calls for expensive medical aid, is the mother, though possessed of wealth, to allow him to succumb to that disease ? Is the preserving of his life of no concern to the deceased's soul, he being the person who is to offer him funeral oblation ? According to Anantakrishna Ayyar, J., no part of the estate can be sold even for maintaining the boy.

It seems to me, on the contrary, that not only in the extreme cases to which I have referred, but even in respect of the boy's education and advancement in life, his mother can legally incur expenses and, if necessary, for meeting them, alienate the estate in her hands. Nor must one forget, that the daughter's son, if he happens to survive his mother, is the very person that would eventually become entitled to that estate. I therefore hold that the alienation in question is valid and binding on the plaintiff.

(2) [1904] 27 Mad. 300 (F.B.).

(3) A. I. R. 1914 Mad. 432=37 Mad. 273 = 17 I. C. 308 (F.B.).

(4) [1896] 18 All. 424=(1896) A.W.N. 155.

(5) [1909] 3 I. C. 77.

(6) A. I. R. 1926 Mad. 517=93 I. C. 49.

(7) A. I. R. 1930 Mad. 287=123 I. C. 812.

The next point to decide relates to the interest that passed at the Court sale. No doubt, to the suit on the mortgage, Suriah and Kanchiah's sons were impleaded as defendants, and against them the claim was dismissed. But what appears from the judgment is, that it was so dismissed on the ground that they were unnecessary parties, the alternative case, that the property belonged to Bhadrariah and not to Saramma, having been found against. Beyond the judgment and the sale certificate, there is no other record in that suit now available, which can throw light on the question, whether the daughter in those proceedings represented the inheritance or not. In such a case, one must necessarily turn to the nature of the debt to decide what passed at the sale: *Akula Sanyasi v. Ramachandra Rao* (8), (at pp. 75 and 78 of 51 *M.L.J.*) : see also *Veerabhadra v. Marudaga Nachiar* (9), (at pp. 204 and 206). On my finding, that the debt was of a binding character, I must hold, differing from the lower Courts, that what passed was the whole property and not merely the interest of Saramma. There is nothing in the judgment in that suit to indicate the contrary and indeed the description in the sale proclamation confirms the view I have taken.

In the result, the plaintiff fails and his suit is dismissed. In the circumstances, I direct each party to bear his costs throughout.

Leave is refused.

P.R.S./V.B. *Suit dismissed.*

(8) A. I. R. 1926 Mad. 692=95 I. C. 691.

(9) [1911] 34 Mad. 188=8 I. C. 1072.

A. I. R. 1932 Madras 31

CURGENVEN, J.

V. K. Kunju Kombi Achan and another
—Petitioners.

v.

Ammu—Respondent.

Civil Misc. Petns. Nos. 2385 and 2980 of 1931, Decided on 19th August 1931.

Malabar Law—Karnavan—Application by karnavan to withdraw appeal—Junior members applying to be made appellants—Application by karnavan filed before applications of junior members—Until orders are passed on application to withdraw matter must be regarded as pending—Karnavan not acting bona fide in withdrawing appeal—Prayer of junior members can be granted—Civil P. C. (1908), O. 1, R. 10.

A suit filed by a karnavan as such is a representative suit and the adjudication in such a suit is binding upon the members of the tar-

wad. But an application by an anandravan either to be added as a party in a suit brought by the karnavan or to be substituted can be allowed only where the Court has grounds to suppose that the karnavan is not acting bona fide in the interests of the tarwad. Where the application to withdraw his appeal is made by the karnavan at some date anterior to the dates on which the applications are filed by the junior members of the tarwad to be impleaded in the appeal as supplemental appellants, and where there is evidence to show that the karnavan has applied to withdraw the appeal with the intention of causing loss to the tarwad the matter must be regarded as pending and the appellant as a party until orders are passed on his application to withdraw and it is in the interest of the tarwad that the appellant should not be allowed to withdraw until the applicants have been added as supplemental appellants: 59 I. C. 233, *Rel. on.*; 32 Bom. 345, *not Foll.*; 10 W. R. 373 and 20 Mad. 129, *Ref.* [P 32 C 1, 2]

C. Unikonda Menon—for Petitioners.

C. R. Viswanadha Ayyar—for Respondent.

Order.—The appellant (defendant 1) in Second Appeal No. 521 of 1930 is the karnavan of a Malabar tarwad. I have to dispose of two applications by junior members of the tarwad to be impleaded in the second appeal as supplemental appellants 2 and 3. A prayer is added that the present appellant, the karnavan should be removed or converted into a respondent. That prayer is however superfluous because the karnavan himself has applied to withdraw his second appeal. The question is whether the two applications to add the junior members as parties should be granted in view of this latter circumstance. It is no doubt true that, when an appellant desires to withdraw his appeal or a plaintiff his suit, the opposing party cannot resist such an application; nor would the Court be justified in disallowing it. This has been held in *Ramcharan Bysack v. Harvey* (1) and *Mahant Biharidasji v. Parshotamdoss* (2).

The former case is also authority for the position that the Court upon such an application being made is immediately deprived of authority to entertain the claim and it can thenceforth only deal with the question of costs. It appears to me that such a view is only compatible with the position that the Court has to pass no order recording the fact of withdrawal and the disposal of the suit by that means and I am not clear that until it passes such an order it is de-

(1) [1868] 10 W. R. 373.

(2) [1908] 32 Bom. 345=10 Bom. L. R. 293.

prived of jurisdiction over the suit for all purposes. It may however be conceded that in all ordinary circumstances the party prosecuting an action may at any time withdraw it. The question however is whether in a representative suit other parties interested in the subject-matter of it may obtain leave to carry it on by being impleaded notwithstanding the withdrawal by the original appellant. It has been held in *Vasudevan v. Sankaran* (3) that a suit filed by a karnavan as such is a representative suit and there is no question that the adjudication in that suit is binding upon the members of the tarwad. It is not of course in all cases that the prayer of an anandravan either to be added as a party in a suit brought by the karnavan or to be substituted, should be granted. The Court must have some grounds to suppose that the karnavan is not acting bona fide in the interests of the tarwad. The present applications are supported by affidavits and the allegation is made in them that there is even now pending a suit filed by the members of the tarwad to remove the present appellant from the tarwad management, and that out of spite owing to the filing of that suit, and with the intention of causing loss to the tarwad the karnavan has decided to withdraw the second appeal. No counter-affidavit has been filed in denial of these allegations, and it appears to me that this ground, if true, is a sufficient reason for allowing the anandravans to carry on the litigation.

The application to withdraw seems to have been filed at some date anterior to the dates on which these applications were filed, but as I have said, I must regard the matter as still pending and the present appellant still a party until orders are passed on his application to withdraw. In somewhat similar circumstances in *Sirajuddin Sahib v. Satar Sahib* (4), Sadasiva Ayyar and Odgers, JJ., allowed the transposition of a defendant into a plaintiff. That was a suit filed by a person calling himself a trustee and during its currency he put in a petition to withdraw it. The question arose whether in view of that application it was open to the Court to transpose a defendant as a plaintiff and much the same arguments were employed as here.

Odgers, J., remarks with reference to the contention that the Court loses jurisdiction as soon as the application is filed:

"It seems clear that, although the plaintiff may be intitled to withdraw his suit when he likes, he can only do so by petition on which the Court must pass orders, with notice to the parties on the question of costs."

I conclude accordingly that for the purpose of passing orders on these petitions the second appeal should still be taken to be pending and that being so, I consider that it is clearly in the interests of the tarwad that the appellant should not be allowed to withdraw until the two applicants have been added as supplemental appellants. It seems reasonable however that their action should not involve the tarwad in any expense which might have been avoided by the withdrawal of the second appeal. They have themselves undertaken personally to meet any costs which may be incurred and I make the order substituting their names for that of the present appellant on condition that they jointly and severally give security for any costs that may be awarded against them in second appeal in the sum of Rs. 150 to the satisfaction of the District Munsif of Palghat within one month from the date of receipt of this order.

P.R.S./P.N. *Application allowed.*

A. I. R. 1932 Madras 32

MADHAVAN NAIR, J.

(Medipalli) Narayanappa—Plaintiff—Appellant.

v.

Kuruba Hanumanthappa—Defendant—Respondent.

Second Appeal No. 2334 of 1927, Decided on 29th January 1931, against decree of Dist. Judge, Anantapur, in Appeal Suit No. 135 of 1926.

Possession—Suit for—Neither plaintiff nor defendant proving title—Plaintiff showing his possession for five years—He is entitled to decree.

Where in a suit brought for possession of land neither the plaintiff nor the defendant has been able to prove his title but the plaintiff has shown that he was in possession for five years when he was dispossessed, plaintiff is entitled to a decree for possession: 2 Pat. L. J. 280; 26 Mad. 514 and 20 Cal. 834 (P. C.), Rel. on; 31 I. C. 55, Ref. [P 33 C 1]

S. Ranganatha Iyer—for Appellant.
K. Rajah Iyer—for Respondent.

Judgment.—In this case the plaintiff-appellant sought to recover possession of a land from defendant 2; and he also

(3) [1897] 20 Mad. 129=7 M. L. J. 102 (F.B.).

(4) [1920] 59 I. C. 233.

asked for an order of injunction against him. It is not necessary to state the facts of the case in any detail.

The plaintiff supported his claim on the basis of title and also possession. The property admittedly belonged to Sanjivappa. The plaintiff lived with him and continued in possession of his land and his house after his death till 1925 when he was dispossessed of the former by defendant 2. The plaintiff put forward a "will" which has been found to be a forgery by the lower Courts. Defendant 2 resisted the plaintiff's case on the ground that he has obtained a sale deed from defendants 3 and 4. Both the lower Courts have found that defendants 3 and 4 had no title to convey to defendant 2 and that he has not proved his title. The result is that neither the plaintiff nor defendant 2 has been able to prove his title but the plaintiff has succeeded in showing that he was in possession for five years. The question is whether on the ground of that possession for five years he is not entitled to get a decree against defendant 2 who has neither title nor possession. It has been held in *Is-mail Ariff v. Mahomed Ghose* (1) by the Privy Council that possession of land is sufficient evidence of right as against a person who has no title whatever and who is a trespasser. I think the principle of this decision should be applied in deciding the present case. It has been held in a series of cases all of which are referred to in *Mt. Sahodra Koer v. Goberdhan Tewari* (2), (at p. 166 of 1917 P. H. C. C.) that where a person has no title, a decree can be given to him on the ground of possession as against a trespasser. The leading decision of this Court is the well-known decision in *Narayana Row v. Dharmachar* (3). It is difficult to support the judgment of the lower Court on any ground. But Mr. Rajah Ayyar has tried to support it on the ground that it must be taken that the possession of the plaintiff began unlawfully, that he came into possession by force after the death of Sanjeevappa and if so, the decision in *Nallagonda Pedda Chinna Reddy v. Asupallee Budda Reddy* (4), would be enough to support the judg-

ment of the lower Court. Assuming that the decision is good law there is nothing to support the suggestion that the plaintiff came into possession forcibly and under the cover of a forged will. The facts show that he was staying with Sanjeevappa and after Sanjeevappa's death continued in possession of the house and the lands. In these circumstances the decree of the lower appellate Court should be set aside and the decree of the District Munsif should be restored with costs here and in the Courts below.

P.R.S./P.N.

Decree set aside.

A. I. R. 1932 Madras 33

ANANTAKRISHNA AIYAR AND SUNDARAM CHETTI, JJ.

(Maddur) *Muniswami Chetty*—Petitioner.

v.

Board of Revenue, Land Revenue and Settlement, Madras and another—Respondents.

Civil Misc. Petn. No. 1227 of 1930, Decided on 22nd April 1931.

(a) *Madras Village Courts Act* (1889), S. 8—Order removing member of panchayat must be deemed to be judicial order and not departmental or administrative.

A member of the Panchayat Court is not as such a departmental subordinate to the Collector. The right, which such member has, concerns his status and is a valuable legal right, and any order which has the effect of, in any way impairing or taking away such right should prima facie be taken to be more of a judicial character rather than that of a mere departmental or administrative character: *Local Government Board v. Arlidge*, (1915) A.C. 120, *Ref.* [P 35 C 1]

(b) *Madras Village Courts Act* (1889), S. 8—"Final" means not open to further appeal.

The word "final" used in S. 8 really means that the said decision is not open to any further appeal and the insertion of the word "final" in S. 8 does not of itself, preclude the High Court from entertaining an application for relief by way of certiorari, if the other conditions be satisfied: 14 Cal. 67 (F.B.); 13 M. L. J. 497; and *Rex v. Nat Ball Liquor Ltd.* (1922) 2 A. C. 128, *Ref.* [P 35 C 2]

(c) *Madras Village Courts Act* (1889), S. 8—Collector cannot delegate his powers to decide questions.

Under S. 8 it is not open to Collector to delegate to any other person the right to decide questions which are confided to him for decision under the terms of the Act. [P 36 C 2]

(d) *Madras Village Courts Act* (1889), S. 8—Enquiry by Collector—Notice to member is necessary.

Ordinarily, the Collector is bound to give notice of the date on which he is going to take a case under S. 8 for enquiry and decision.

[P 37 C 1]

(1) [1893] 20 Cal. 834=20 I. A. 99=6 Sar. 305 (P.C.).

(2) [1917] 2 Pat. L. J. 280=39 I. C. 458.

(3) [1903] 26 Mad. 514.

(4) [1915] 31 I. C. 55.

(e) Madras Village Courts Act (1889), S. 8—High Court has power to entertain application for relief by way of certiorari in cases of inquiry by Collector.

Merely the circumstance that a Collector acting under S. 8 is not a Court is no obstacle to High Court's entertaining an application for relief by way of certiorari if other conditions are satisfied since the High Court has such power in respect of persons or bodies exercising judicial functions and adjudicating legal rights of parties. in addition to its powers of supervision and revision under S. 115, Civil P. C. and S. 107, Government of India Act: 39 *Mad.* 1085; *A. I. R.* 1919 P. C. 31 and *A. I. R.* 1930 *Mad.* 896, *Ref.* [P 37 C 2]

(f) Madras Village Courts Act (1889), S. 8—Authorities acting under S. 8 must do so according to rules of natural justice.

Madras Village Courts Act does not prescribe in detail the procedure to be adopted in deciding matters under S. 8 and consequently in the absence of any prescribed procedure the authority concerned must act according to the rules of natural justice: *Local Government Board v. Alridge*, 1915 A. C. 120, *Ref.* [P 38 C 1,2]

T. K. Srinivasathachariar — for Petitioner.

The Govt. Pleader—for Respondents.

Order.—This is an application filed by Maddur Muniswami Chetty praying that the High Court may be pleased to issue a writ of certiorari to the Board of Revenue, Land Revenue and Settlement, Madras (respondent 1), and the Collector of Chittoor, (respondent 2), and to call for the entire records in connexion with the proceedings taken against the petitioner which resulted in the removal of the petitioner from his position as a member of a Panchayat Court, and to quash the proceedings.

The petitioner was one of the members of the Panchayat Court of Tirupathi. The President of the Board sent up a complaint against the petitioner alleging that the petitioner was guilty of certain specific misconduct and that he was not a fit person to continue as a member of the Panchayat Court. The petitioner in his turn sent up a petition against the President of the said Court charging him with irregularity in the conduct of the proceedings and other specific acts mentioned in that petition. The Collector of Chittoor directed the Tahsildar of Chandragiri Taluk to enquire into the matter of both the petitions after giving due notice to the petitioners. The Tahsildar, it is alleged, gave notice to the petitioner as well as the President in respect of both the above petitions, and after taking the depositions of several witnesses sent up

the records to the Collector. The Collector passed orders on 8th October 1929 to the following effect:

"M.R. Ry. Madduru Muniswami Chetty Garu is a member of the Village Panchayat Court at Tirupathi. He is found to be quarrelsome within the Court during the conduct of its business. His membership of the Court is clearly prejudicial to its efficiency and reputation. He is therefore removed under S. 8, Madras Village Courts Act, 1889, from the membership of the Court, with effect from the date of this order."

The petitioner thereupon appealed to the Board of Revenue. The Board of Revenue dismissed the appeal by its resolution dated 12th February 1930. The Board remarked that "it has perused the appeal petition and the connected records" and that it considers that the appellant is unsuitable to be a member of the Panchayat Court. The appeal was accordingly dismissed. Muniswami Chetty filed the present application to the High Court, and in the affidavit that he filed in support of his application he made allegations to the effect that no notice was given to him of the inquiry by the Tahsildar that the enquiry was conducted in his absence, and at one stage when he was present he was directed to stand outside the building while the Tahsildar was examining certain witnesses. In effect he complained that the enquiry by the Tahsildar did not comply with the principles of natural justice. The affidavit also went further and specifically stated that no formal charges were framed either by the Tahsildar or by the Collector and that he had no opportunity of either explaining the evidence against him or to adduce evidence in his favour which he wanted to adduce. He also complained that his counsel was not given an opportunity to argue his appeal before the Board. Having regard to the serious nature of the allegations made in the affidavit we issued notice to both the respondents, namely, the Board of Revenue and the Collector. When this matter came before us on a former occasion, we had before us only the affidavit of the petitioner and also the affidavit filed by the Collector in answer to allegations contained in the petitioner's affidavit. We thought that it would be more satisfactory if an affidavit from the Tahsildar who conducted the enquiries in this case under the order of the District Collector could be filed is available.

Now we have got an affidavit sworn to by the Tahsildar, and the petitioner has filed his reply affidavit with reference to the Tahsildar's affidavit.

Before we go further into the merits of the controversy we think it proper to consider one or two points of a preliminary nature raised in the affidavit filed by the Collector.

In para. 4 it is stated:

"Neither the Collector nor the Board of Revenue when exercising the powers conferred on them by Madras Act 1 of 1899 are subordinate to the jurisdiction of this Honourable Court."

In para. 7 it is alleged as follows:

"The action of the Collector in removing the petitioner from office, and of the Board of Revenue in affirming the said action, are departmental and administrative in respect of which a writ of certiorari does not lie."

If the said orders are in essence departmental or administrative orders, it is clear that remedy by way of certiorari would not ordinarily be available to the petitioner. In this connexion it is desirable to refer to the provisions of S. 8, Madras Village Courts Act. Under that section:

"the Collector of the District may suspend or remove a Village Munsif or a member of the village Court for incapacity, neglect of duty, misconduct, or other just and sufficient cause, and shall do so on a requisition passed by the District Judge for like cause appearing in the judicial proceedings of a Village Munsif."

Paragraph 2 of that section is also important.

"From every order of suspension or removal, an appeal may be made within three months to the Board of Revenue if the order was passed by the Collector without orders from the District Judge, or to the High Court if passed upon such orders. The decision of the Board of Revenue or the High Court, as the case may be, on all such appeals shall be final."

Reading the provisions of S. 8, it is clear that the order complained of in the present case could not be said to be a mere departmental or administrative order. A member of the Panchayat Court is not as such a departmental subordinate to the Collector. The right, which such member has, concerns his status and is a valuable legal right, and any order which has the effect of, in any way, impairing or taking away such right should prima facie be taken to be more of a judicial character rather than that of a mere departmental or administrative character. This view derives strength by reason of the fact that para. 2 of the section allows an appeal to the High Court against such orders in certain

cases, as, for example, when the initiative was taken by the District Judge by making a requisition to the Collector to proceed under S. 8 of the Act. It cannot be said that one and the same order, if it was initiated in one way is of a departmental or administrative character, but that, if it was initiated in another way, it is of a judicial character, more especially when the result of the order would be to take away from a person his status as a member of the Panchayat Court. It could not be contended that a right of appeal is given to the High Court in respect of a mere departmental or administrative order passed by the Collector.

As observed by Lord Parmoor at p. 142 (of 1915, A. C.) *Local Government Board v. Arlidge* (1):

"Whether the order of the Local Government Board is to be regarded as of an administrative or a quasi judicial character appears to me not to be of much importance, since if the order is one which affects the rights and property of the respondent, the respondent is entitled to have the matter determined in a judicial spirit, in accordance with the principles of substantial justice."

It is clear that the essence of the proceedings before the Collector in this case was one relating to the legal rights possessed by the petitioner as a member of the Panchayat Court, and the decision being one relating to a judicial matter, we think that the preliminary points mentioned in the Collector's affidavit about the want of jurisdiction in this Court to deal with this matter should be decided against the Collector.

Then it was argued by the learned Government Pleader that, having regard to the last sentence in S. 8 of the Act, namely, that the decision of the Board of Revenue or the High Court as the case may be on all such appeals shall be "final", the petitioner has no further remedy. It could not be contended at this time of the day that because the word "final" is used, therefore the remedy by way of certiorari is not available, if in other respects a party would be entitled to the same. The word "final" used in the sections really means that the said decision is not open to any further appeal. The question as to what is the meaning of the word "final" had to be considered in

(1) [1915] A. C. 120=84 L. J. K. B. 72=111
L. T. 905=79 J. P. 97=12 L. G. R. 1109=
30 T. L. R. 672.

Fahami Tannissa Begum v. Secy. of State (2) and *Muthuvaian v. Periaswami Iyer* (3). It is however not necessary to go into those cases just now, because the Privy Council had to consider the effect of the insertion of such words in enactments in relation to the remedy by way of certiorari. In *Rex v. Nat Ball Liquor Limited* (4), at pp. 159 and 160, their Lordships of the Privy Council consider this question. Their Lordships remark that the insertion of the words "final," and "without appeal" in statutes does not restrict or take away the right of the superior Court to bring the proceedings before itself by certiorari, if the other conditions be satisfied. Even after the insertion of such words in several statutes, and even after the decision of the Courts that the insertion of such words does not take away the remedy by way of certiorari in proper cases, the legislature has not thought proper to make any amendments. The Privy Council further remarked that the legislature by continuing to use the same language in subsequent enactments should be taken to have accepted this interpretation put upon these words by Courts. Those remarks substantially apply to the present case also.

As remarked in Halsbury's Laws of England, Vol. 10, p. 175, para. 345:

"Certiorari can only be taken away by express negative words. It is not taken away by words which direct that certain matters shall be 'finally determined' in the inferior Court, nor by a proviso that 'no other Court shall intermeddle' with regard to certain matters as to which jurisdiction is conferred on the inferior Court."

Again in para. 346, it is stated:

"Clauses by which certiorari is taken away are strictly construed."

In Warton's Law Lexicon, p. 150, it is stated as follows:

"An appeal does not lie unless it is expressly given by statute, but certiorari always lies unless it is expressly taken away by statute."

It therefore seems to us that the insertion of the word "final" in S. 8 does not, of itself, preclude the High Court from entertaining an application for relief by way of certiorari, if the other conditions be satisfied. With these remarks, we proceed to deal with the application on its merits.

The chief allegations made by the peti-

tioner are, as has been mentioned already that he had no notice of the inquiry made by the Collector, and that no charges were framed against him. It is also mentioned that the Collector has no jurisdiction to delegate his functions in this matter to any other officer. The answer to the latter contention is clear. The Collector is the officer to whom this power is given by the Act, and it is not open to him to delegate to any other person that particular jurisdiction—that is the right to decide questions which are confided to him for decision under the terms of the Act. But in this case the Collector has not done anything like that. He has not delegated to any other person his right to decide the matter. What has been done is to direct a subordinate of the Collector, namely, the Tahsildar of Chandragiri, to give notice to the parties interested to inquire into the matter, to record evidence, and submit the records to him, so that, with those materials before him the Collector may use his own discretion in the matter and exercise the jurisdiction specially vested in him by S. 8 of the Act. The present case not being a case of delegation, the cases quoted by the learned advocate for the petitioner do not call for any special notice in this connexion.

The action of the Tahsildar has been severely criticized on behalf of the petitioner. But, after reading the affidavit filed by the Tahsildar, we feel no doubt that of the two versions, the Tahsildar's version is clearly the one that we should act upon. We have got the admitted fact that on 11th August 1929 the petitioner gave a statement before the Tahsildar. The petitioner is no doubt right in complaining that no "formal charges" were framed in this matter. It would have been more satisfactory if that had been done, and such a procedure would have rendered unavailable to the petitioner the main argument which he has been urging to get rid of the order against him. But we find from the statement of the petitioner referred to above, that the acts complained of against him were specifically put to him. In fact the very first sentence of that statement makes it clear that he was apprised of the real matters of complaint made against him, and asked to give his own explanation. The Tahsildar also states that he explained the contents of both

(2) [1887] 14 Cal. 67 (F.B.).

(3) [1903] 13 M. L. J. 497.

(4) [1922] 2 A. C. 128=91 L. J. P. C. 146=127 L. T. 437=38 T. L. R. 541.

the petitions to the petitioner as well as to the President. He also states that the petitioner was present when the inquiry was being conducted, except at a later stage when owing to the petitioner's own default, he was not present though the date to which the inquiry was adjourned was communicated to him. On 30th August 1929 the petitioner again went to the Tahsildar and gave a list of certain witnesses. The Tahsildar states that of the witnesses mentioned in the list such of those as the petitioner wanted to be examined were examined. The Tahsildar swears that the petitioner was never asked to go out of the building when the evidence was being recorded. Having regard to the statements made by the Tahsildar, and seeing that the Tahsildar's statements are supported by other records in the case, we think that the complaint made by the petitioner under the several heads mentioned above has not been made out. But it was argued that the petitioner was not given an opportunity to argue before the Collector. It does not appear that the petitioner expressed any desire to be given an opportunity to do so. Ordinarily the Collector is bound to give notice of the date on which he is going to take a case like this for inquiry and decision. But having regard to the course taken in the present case one can easily see that the petitioner was satisfied with making his representations in writing to the Tahsildar and leaving the Collector to go through the records and to pass such orders as he thought proper. We do not think that, in the circumstances of the present case, the Collector's failure to give further notice to the petitioner should be taken to have really prejudiced the petitioner.

Then it was argued that before the Board of Revenue also the petitioner's counsel was declined an opportunity to argue his case. The appeal to the Board was prepared by his learned advocate, and he stated in that petition of appeal that, "if necessary, he might be heard." Having regard to the context, the reasonable interpretation of the appeal memorandum is that the petitioner was satisfied with putting his points in writing, and left it to the Board whether it would, in the circumstances, hear counsel. Having left the matter to the Board to decide whether counsel should be heard or not,

it is not open to the petitioner now to complain that his counsel was not heard. If we were not able to place that interpretation on the appeal petition, and if it were clear to us that the advocate who presented that petition to the Board expressed a specific desire therein to be allowed to be heard orally before final orders are passed, and if the Board in spite of the same, passed orders against the petitioner without giving a proper opportunity for hearing the petitioner's counsel as requested, then the question will arise whether the Board in disposing of an appeal under the Village Panchayats Act is bound to hear the appellant or his counsel orally, and whether the decision of the Board arrived at otherwise would be legal and whether it would have to be vacated and the appeal remitted to the Board for fresh disposal after giving a proper opportunity to the petitioner's counsel to argue the appeal.

In the circumstances of the present case, we need not go into that question.

In the present case, we need not consider whether the Collector deciding matters referred to in S. 8, Village Courts Act, is a Court or not. The learned Government pleader drew our attention to *Chinnayya Goundan, In re* (5), and to the provisions of the Madras Act 3 of 1895, and argued that the Collector could not be said to be "a Court," and that the High Court has no jurisdiction over him, either under S. 115, Civil P. C., or under S. 107, Government of India Act. It is not necessary for us to express any opinion on that point, because it has been held that the High Court's power to issue writs of certiorari is not confined to "Courts" subordinate to the High Court. In *Anne Besant v. Emperor* (6), by this Court, and by the Privy Council on appeal in *Anne Besant v. Advocate-General of Madras* (7) at pp. 159 to 161 it has been remarked that the power of certiorari is a power which the High Court possesses in addition to its powers of supervision and revision under S. 115, Civil P. C., and S. 107, Government of India Act. In respect of persons or bodies exercising judicial functions and adjudicating on legal rights of parties, it has been held that such a writ

(5) A.I.R. 1922 Mad. 337=66 I.C. 566.

(6) [1916] 39 Mad. 1085=37 I.C. 525.

(7) A.I.R. 1919 P.C. 31=52 I.C. 209=46 I.A. 176=43 Mad. 146 (P.C.).

of certiorari would lie. In 10 Halsbury 161, para. 320, it is remarked that "certiorari lies to remove, for the purpose of quashing, the determinations of persons or bodies who are by statute or charter entrusted with judicial functions out of the ordinary course of legal procedure. . . ."

though

"the determinations of such authorities are not judgments in the sense required to admit of a writ of error being brought in respect of them: see also p. 160, para. 320, of the same Vol. 10 of Halsbury's Laws of England where it is stated that certiorari lies at common law to remove the proceedings of inferior Courts or judicial bodies for the purpose of quashing such proceedings where the writ of error did not lie?"

Similarly in *Local Government Board v. Arlidge* (1), decided by the House of Lords, Lord Haldane, L. C. observed at p. 133 :

"If the Local Government Board failed in this duty, its order might be the subject of certiorari, and it must itself be the subject of mandamus."

Lord Parmoor referred to this point at p. 140 :

"The power of obtaining a writ of certiorari is not limited to judicial acts or orders in a strict sense, that is to say, acts or orders of a Court of law sitting in a judicial capacity. It extends to the acts and orders of a competent authority which has power to impose a liability or to give a decision which determines the rights or property of the affected persons."

On the subject of certiorari generally, we may refer to a very recent decision of Venkatasubba Rao and Madhavan Nair, JJ., reported in *Venkataratnam v. Secretary of State* (8), where the law relating to certiorari is exhaustively considered, and the conclusion is reached that, in the absence of express statutory prohibition, this High Court possesses the same jurisdiction in certiorari as the Court of King's Bench in England.

It is therefore clear that the circumstance that the Collector is not a Court presents no insuperable obstacle to our entertaining this application by way of certiorari, if the other conditions be satisfied, having regard to the nature of the adjudication in question.

It should be observed by way of a general answer to most of the contentions raised by the learned advocate for the petitioner that the Madras Village Courts Act does not prescribe in detail the procedure to be adopted in such matters. In the absence of any specific procedure prescribed by the Act, the authority con-

cerned will have to act according to the rules of "natural justice." What these rules are had to be considered by the House of Lords in the case of *Local Government Board v. Arlidge* (1) already referred to. The essentials of natural justice applicable to such cases have been examined by the several learned Lords who took part in that decision. At p. 132, Viscount Haldane, L. C., stated as follows :

"When the duty of deciding an appeal is imposed, those whose duty it is to decide must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice?"

At p. 140, Lord Parmoor observed as follows :

"In determining whether the principles of substantial justice have been complied with in matters of procedure, regard must necessarily be had to the nature of the issue to be determined and the constitution of the tribunal."

At p. 138, it was remarked by Lord Shaw :

"If a statute prescribes the means, it must employ them. If it is left without express guidance, it must still act honestly and by honest means. In regard to these, certain ways and methods of judicial procedure may very likely be imitated; and lawyer-like methods may find special favour from lawyers. But that the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation. And the assumption that the methods of natural justice are ex necessitate those of Courts of justice is wholly unfounded."

Finally, to quote the observations of Lord Parmoor at p. 140 :

"Where however the question of the propriety of procedure is raised in a hearing before some tribunal other than a Court of law, there is no obligation to adopt the regular forms of legal procedure. It is sufficient that the case has been heard in a judicial spirit and in accordance with the principles of substantial justice."

Having regard to the above observations made by the noble and learned Lords as to what course should be followed in cases not specifically provided for by any particular statute, and after examining the records in the present case, we are not satisfied that the principles of natural justice have not been applied to the case of the petitioner. That being so, we dismiss this application with costs.

P.R.S./V.B. *Application dismissed.*

(8) A.I.R. 1930 Mad. 896=128 I. C. 851=53 Mad. 979.

A. I. R. 1932 Madras 39

VENKATASUBBA RAO, J.

Jagannatha Mudali and others—Appellants.

v.

P. T. Chinnaswami Chetti (died) and others—Respondents.

Second Appeal No. 368 of 1928, Decided on 21st April 1931, against decree of Sub-Judge, Vellore, in A. S. No. 36 of 1926.

(a) Evidence Act (1872), S. 112—"Access" means sexual intercourse.

Access means "sexual intercourse" and nothing short of it: *Banbury Peerage Case*, 57 E. R. 62, Ref. [P 40 C 1]

(b) Evidence Act (1872), S. 112—Effect of S. 112 considered.

Effect of S. 112 is that there is a presumption under S. 112 to start with in favour of legitimacy; in other words that the husband had intercourse with the wife at the time when the child must have been conceived. That presumption is a rebuttable one and may be rebutted by showing non-access; but once access of or intercourse by, the husband is proved, no evidence will be allowed to show that the child is not the child of the husband. The circumstance that the wife had intercourse with several at that time, makes no difference: *Cope v. Cope*, 5 Car. & Pay. 604, Ref. [P 40 C 2, P 41 C 1]

T. M. Krishnaswami Ayyar and B. C. Seshachala Ayyar—for Appellants.

A. S. Sivakaminathan and C. Gopalan—for Respondents.

Judgment.—This appeal raises a question regarding the construction of S. 112, Evidence Act.

Defendant 8 is the wife of one Kuppathai Mudali and defendants 3 and 4 are her sons. The plaintiff disputes their legitimacy alleging that defendant 8 was living in adultery. The point to be decided is, whether defendants 3 and 4 are the legitimate sons of Kuppathai. The findings of fact, which, this being a second appeal, I must accept, are that Kuppathai married defendant 8 about 1876, but discarded her in 1881 owing to some suspicion about her chastity, that he then married a second wife and lived at a place called Govindanpadi, whereas defendant 8 left for Kilachur, a village within two miles of that place. There she was residing and the Subordinate Judge thinks that she was having immoral relations with some person. Defendant 3 was born in 1891 and defendant 4 in 1898. It is not found that Kuppathai did not have opportunities of access to his first wife; on the contrary, the evidence seems to indicate that he had them. In regard to the period to

which reference must be had, the evidence no doubt is very vague; but Kuppathai in 1902 purchased for her some property and in 1905 executed a document settling some lands on her and on her children. In this Kuppathai describes the boys as the sons of defendant 8. I may remark in passing that the learned Subordinate Judge thinks that these words strongly support the contention that the children are illegitimate. There are other passages on which the Judge relies, to which I need not refer. Later in the same year, and again in 1906, Kuppathai bought for her some more property. The evidence also shows that he allowed the boys to visit him and took some kind of interest in them, though what precisely its nature was it is difficult to say. In 1909 he executed a writing repudiating the children as illegitimate. That was attested by several persons including one Rasappa, a brother of defendant 8. This man has not been cited as a witness although defendant 8 admits that they have been on friendly terms. What led to this repudiation the evidence does not clearly show; but it is suggested that it was some members of his caste that induced Kuppathai to take this step. This was followed in 1915 by a deed which he executed revoking the settlement of 1905. Then there was an open quarrel which led to various proceedings in Courts, where the legitimacy of the boys was asserted by the one side and disputed by the other. I have forgotten to mention that in 1909, about the time when Kuppathai repudiated the boys, he married a third wife. He having died in 1918, his second and third wives sold a part of his estate to the plaintiff, who thereupon has brought the suit. It is in this way that the question of the legitimacy of defendants 3 and 4 has been raised. The Subordinate Judge, differing from the trial Court, has decided the point against them.

Their counsel has not succeeded in showing that his findings, so far as they are questions of fact, can be attacked in second appeal. I have referred in this judgment to those facts alone which bear on the question, whether Kuppathai had opportunities of access to his wife or not. That being the important point with which I have to deal, as I shall show presently, I do not propose to refer to the other facts on which the Subordinate

Judge relies. The question, as I have said, is what is the effect of S. 112, Evidence Act?

According to that section the fact that a child was born in lawful wedlock is "conclusive proof" that it is the legitimate son of its mother's husband. If the section had stopped there, the presumption would be an irrebuttable one, what is termed *presumptiones juris et de jure*. But the section does not end there, for then follows a clause beginning with the word "unless" which reads thus:

"Unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

The effect of the section taken with that clause therefore is that the presumption is not an irrebuttable one, though the words "conclusive proof" (defined in S. 4) are used. The section itself enacts how that presumption can be rebutted. It can yield only to positive proof of want of access—whatever the word "access" may mean. If that access is proved, nothing further remains; the presumption rebuttable in the first instance becomes at once irrebuttable. This is the effect of S. 112. That there are two distinct presumptions, differing in kind from each other, is sometimes lost sight of, and that has led to some confusion. With these remarks, let me now turn to the meaning of the word "access." If that means "opportunity of access" the plaintiff must fail, for Kuppathai, I have said, had such opportunity. If, on the other hand, it means sexual intercourse, I am afraid I cannot disturb the Subordinate Judge's finding in second appeal. In my opinion, there can be no possible doubt on the authorities that the word means sexual intercourse. That was declared after great deliberation to be the law in the *Banbury Peerage* case (1). It was there pointedly stated that access in this connexion means sexual intercourse and nothing short of it. Now the learned Judges go so far as to use the word "access" in the sense of sexual intercourse to distinguish it from non-access or non-generating access. The expression "opportunities of access," is also found used by the Judges as something different from actual intercourse. The effect of the *Banbury Peerage* case (1) may be thus summed up. The presumption of legitimacy arises from the birth

of a child during wedlock; but that presumption may be rebutted by evidence that such access did not take place between the husband and the wife as by the laws of nature is necessary, for the man to be in fact the father of the child. It is not the opportunity of access that matters, but sexual intercourse. The presumption in favour of legitimacy is also thus expressed:

"Where a child is born in lawful wedlock, sexual intercourse is presumed to have taken place between husband and the wife."

This presumption, in whatever way it may be stated, is, as pointed out, a rebuttable presumption, a presumption that may be rebutted by counter evidence, showing non-access.

Then comes the question, Where does the other presumption to which I have referred to, *presumptiones juris et de jure* come in? Now let us turn to the next leading case on the point, *Morris v. Davies* (2). The Lord Chancellor (in the House of Lords), after stating that the presumption that in the case of husband and wife, sexual intercourse took place can be rebutted, goes on to observe:

"If sexual intercourse be proved, that is, if the jury or the Judge trying the question of fact be satisfied that sexual intercourse took place between the husband and the wife at the time of the child being conceived, the law will not permit an enquiry whether the husband or some other man was more likely to be the father of the child."

This is the point of distinction. If access or sexual intercourse is proved, the presumption to be drawn becomes an irrebuttable one. The point is brought out very clearly in the following passage from the judgment of Swift, J.:

"Any woman may, and some do, have sexual intercourse with more than one man in the course of a few hours, and if a woman has within the period during which conception must have taken place had connexion with more than one man * * * the law presumes that if one of those men is her husband, the child is his * * * However many men she has had connexion with nothing can bastardize the child unless non-access of or non-intercourse by the husband can be proved: *Warren v. Warren* (3), at p. 112."

In the words of Alderson, B [in *Cope v. Cope* (4)] the law will not, under such circumstances, allow the balance of the evidence as to who is most likely to have been the father. In short, there is a presumption to start with in favour of legitimacy; in other words, that the hus-

(2) 7 E. R. 365.

(3) [1925] P. 107=94 L. J. P. 68=133 L. T. 352=69 S. J. 725=41 T. L. R. 599.

(4) 5 Car & Pay 604=1 M. & Rob. 269.

(1) 57 E. R. 62.

band had intercourse with the wife at the time when the child must have been conceived. That presumption is a rebuttable one and may be rebutted by showing non-access; but once access of or intercourse by, the husband is proved, no evidence will be allowed to show that the child is not the child of the husband. The circumstance that the wife had intercourse with several at that time makes no difference. It is confounding these two presumptions, when the law is being stated, that leads to difficulty; but as regards what the law on the point is, there can be, as I have said, no doubt.

Then the further question arises: What is the kind of evidence that is required to rebut the presumption of legitimacy, in other words, the presumption that the husband had intercourse with the wife, which should have made him the father of the child? That presumption is a very strong one, but the strength of it would vary with the circumstances of each case. The *Aylesford v. Peerage* (5) furnishes a striking instance, where it was held that the presumption of legitimacy was rebutted. The facts are, the lady eloped in 1876 and a deed of separation was executed in 1877. From the time of the elopement till the birth of the child in 1881, the mother lived in a state of adultery with Lord Blanford. The husband and the wife, no doubt, were at the same time, during the critical period when the child might have been conceived, at different houses in London. In those circumstances the question was raised, whether the presumption was rebutted. It was answered in the affirmative. Lord Blackburn goes so far as to say that although the marriage tie remained undissolved, the facts stated having been found, no presumption can arise, that the husband had cohabited with his wife. But it seems to me, having regard to S. 112, Evidence Act, it is unnecessary to go so far. The presumption must be drawn under that section, though, on the facts proved, it may become attenuated. In *Hitherington v. Hitherington* (6), where an order was made under S. 4, Matrimonial Causes Act, 1878, authorizing a wife to refuse to cohabit with her husband, it was held that from the time of such an order:

"all the presumption which exists in the case of married persons as to access and the legitimacy of children is reversed."

Again, I may point out that it is not necessary for us to go so far. The case shows, that while normally the presumption is strong, in certain cases it is not quite so strong. The last mentioned case is approved in *Andrews v. Andrews* (7). In the case to which I have referred, *Morris v. Davies* (2), the husband and wife agreed to separate and afterwards lived apart, but within such distance as afforded them opportunities of sexual intercourse. On the facts, it was held that the presumption of law in favour of the legitimacy of a child begotten and born of the wife during the separation, was rebutted. It is unnecessary to multiply cases. The short question is: Has the learned Judge correctly applied these principles? He is wrong in stating that there was judicial separation between Kuppathai and his wife. Such a conception is foreign to the Hindu law. The statement, that in the case of children born after such separation, there is no presumption that they are legitimate, is, as I have said, also open to exception. But have these errors vitiated his judgment? In the weight of the evidence, he has not been influenced by his somewhat inaccurate statement of the rule of presumption. Indeed, the case was a difficult one to try, but all the facts were considered by the Judge. It may be, on the evidence, another Judge may come to a different conclusion, but that is no reason why I should disturb the finding in second appeal.

The appeal as well as the cross-appeal are dismissed with costs.

P.R.S./V.B. *Appeal dismissed.*

(7) [1924] P. 255=93 L. J. P. 137=40 T.L.R. 873.

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BEASLEY, C. J. AND WALSH, J.

M. Varadaiah Chetti and another—Appellants.

v.

K. Narasimhalu Chetti and others—Respondents.

Appeal No. 61 of 1926, Decided on 19th November 1930, against order of Sub-Judge, Vellore, D/- 22nd October 1925, in E. P. No. 51 of 1925, and O. S. No. 14 of 1923.

(a) Civil P. C. (1908), Ss. 33 and 47—Final decree—Certain directions as to who is to

(5) [1886] 11 A. C. 1.

(6) [1887] 12 P. 112.

execute it—No objection then—It cannot be objected to during execution.

Where the decree directs the temple trustees to execute the decree, and if no objection has been raised regarding the direction when the final decree has been passed, that objection cannot be raised in execution: 43 *Mad.* 675; 38 *Bom.* 194; 44 *Cal.* 627; *A. I. R.* 1929 *Bom.* 217 and *A. I. R.* 1925 *Cal.* 907, *Ref.* [P 43 C 2]

(b) Civil P. C. (1908), S. 47—Decree—Direction to deliver trust property to new trustees is correct—It is executable decree

A decree which directs the delivery of trust property to new trustees is perfectly correct. Such a decree is an executable one and not merely declaratory: 58 *I. C.* 566; 28 *All.* 112; *A. I. R.* 1927 *Mad.* 416; 31 *Mad.* 212 and 10 *Mad.* 375, *Ref.* [P 44 C 1]

S. Varadachariar and S. V. Venugopalachari—for Appellants.

A. C. Sampath Iyengar and T. R. Srinivasa—for Respondents.

Beasley, C. J.—The facts out of which this appeal arises have already been set out in the judgment in *Adinarayana Chetty v. Narasimha Chetty* (1). On 19th July 1925, the newly appointed trustees, as petitioners sought to execute the decree of the Subordinate Judge referred to in *C. R. P. No. 1399 of 1925* and they filed *E. P. No. 51 of 1925*. The respondents opposed that petition and raised a number of objections before the then Subordinate Judge of Vellore who dismissed the petition on the grounds that the newly appointed trustees, the petitioners, were not parties to the decree and had not been added as parties under O. 1, R. 10, Civil P. C.; that the right to execute the decree was not given to them; that they had not come under O. 22, R. 10, Civil P. C., and were not transferees of the decree, and further that the order that the Court was to approve of the appointment of the newly elected trustees was ultra vires and also that the decree is a variation of the provisions of the consent decree. The learned Subordinate Judge further said that the trustees must come by a separate suit and have their claims as trustees recognized by the Court—this notwithstanding the fact that an application was made to the Court for the approval of the appointment of the newly elected trustees, and the Court's approval was given. On behalf of the respondents it is pointed out that the plaintiffs in the suit first sought to execute the decree by an execution petition but that owing to the right of the

plaintiffs to execute the decree being questioned in the office, the petition was withdrawn and the present petitioners, the appellants here, substituted for the plaintiffs in the suit.

This, it is argued on behalf of the respondents is contrary to all practice and that the petitioners should have applied to have themselves brought on the record as parties to the suit and that not having done so they cannot execute the decree nor can they be treated as assignees of the decree and continue the proceedings because the procedure provided for by O. 22, R. 10, has not been followed: *Ratnam Pillai v. Annamalai Desikar* (2). Much reliance was placed upon the Full Bench decision in *Veeraraghavachariar v. Advocate-General of Madras* (3) because it was argued that the provision in the scheme, that after the new trustees had been elected their appointment was subject to the confirmation of the Court was ultra vires. The Full Bench, of which I was a member, held that if in a decree for a scheme framed under S. 92, Civil P. C., liberty is given to persons to apply to the Court for directions merely to carry out the scheme already settled such reservation of liberty in the decree will be intra vires if the assistance of the Court can be given without offending against S. 92, Civil P. C.; but where liberty is given to apply to the Court for alteration or modification of the scheme such reservation is ultra vires as offending against that section. It is very strange to find that the respondents who were parties to the suit and the compromise decree and agreed to the scheme now were here contending that the provision is ultra vires and, in my opinion, they have not only shown themselves obstructive but have misapplied the Full Bench decision. Dealing with this question Phillips, J., on p. 44 says :

"This principle therefore of reserving liberty to apply in temple suits appears to me to be based on wrong premises. It should only be done when the Court is unable, or for good reasons thinks it advisable not to finally determine any question arising for its decision but to leave such decisions for a future date. Unless there is some ground of this sort, the decision must necessarily be final and therefore that such final decision can be altered by a mere application would seem to be ultra vires. I may observe here that the question put to us is a double question and the answer to the two

(2) *A. I. R.* 1924 *Mad.* 615=84 *I. C.* 200.

(3) *A. I. R.* 1927 *Mad.* 1073=106 *I. C.* 665=51 *Mad.* 31 (F. B.).

(1) *A. I. R.* 1931 *Mad.* 471=132 *I. C.* 654=54 *Mad.* 337.

parts of the question must be different. The first is where liberty to apply is reserved * * * to ask for directions as to carrying out the scheme'. . . . So far as this is concerned this may well be intra vires unless it contravenes the provisions of S. 92, Civil P. C., for the assistance of the Court is asked merely to carry out what it has already ordered, and if such assistance can be given without contravening the provisions of S. 92, there can be no objection to such a rule being framed."

In the present case there was no alteration or modification of the scheme provided for. What was provided for was the carrying out of what had already been ordered, namely, the appointment of new trustees. For greater caution it was provided that the election held was to be subject to the confirmation of the Court and there is no substance in the argument that such an order contravenes the provisions of S. 92, Civil P. C. It is further argued that para. (2) of the consent decree directs that the amounts found to be owing by the defendant are to be payable to the plaintiffs and not to the newly elected trustees, but that the order made in C. M. P. No. 107 of 1924 directs such sums to be paid to the trustees; and it is contended that this is a variation of the consent decree and that a consent decree cannot be varied except by consent. In support of this argument the Privy Council decision in *Kinch v. Valcott* (4) is referred to. Here again this argument has no substance. Cl. (2) of the decree speaks of what is due to the defendants from out of the temple funds and directs that what is due to or by any of the parties to the other the same is to be paid by whomsoever it is found payable to the other. This clearly means that the money found to be due by either the plaintiffs or the defendants is due from or to the temple and it certainly does not mean that the plaintiffs are themselves to pay moneys due by the temple to the defendants out of their own pockets, nor does it mean that the sums found due from the defendants are to go into the pockets of the plaintiffs. The decree clearly contemplates payment to and by the only persons competent to deal with the temple funds, namely, its trustees. Further Cl. (3) provides that it is only on payment of defendant 1 of whatever sum that may be found due by the commissioner that the newly elected trustees can take possession of the temple and its properties. Cls. (2) and

(3) clearly have to be read together; and when Cl. (3) of the order in C. M. P. No. 107 of 1924 is referred to, it is seen that the defendants are to pay sums of money to the temple trustees on behalf of the temple and that the trustees of the temple can execute the decree on behalf of the temple only on payment of the court-fees on the amounts ordered to be paid by defendants 1 and 3 to the said temple trustees. Obviously there has been no variation of the consent decree. As there has been in my view, no variation of the consent decree *Lachiram v. Jana Yesu Mang* (5) and *Gora Chand Haldar v. Prafulla Kumar Roy* (6) have no application. Even the latter case does not assist the respondents' argument because there it was held that where a decree presented for execution was made by a Court which apparently had no jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person, to make the decree, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction and that within these narrow limits the executing Court is authorised to question the validity of a decree. But if, on the face of the decree, there is no want of jurisdiction, the executing Court cannot question the decree. Here the decree directs the trustees to execute the decree, and if no objection was raised when the final decree was passed that objection cannot be raised in execution: *Zamindar of Ettiyapuram v. Chidambaram Chetty* (7), *Hari Govind v. Narasingh Rao* (8) and *Kalipada Sarkar v. Hari Mohan* (9).

In *Lakshmibai v. Ravji* (10), the case in *Gora Chand v. Prafulla Kumar* (6) was dissented from. It was there held that the executing Court has no jurisdiction to go into the question whether the Court which passed the decree committed any error in the exercise of its discretion. The decree in this case is perfectly clear. It directs the trustees to execute the decree on behalf of the temple and they are the persons in whose favour the decree has been passed; and

(5) A. I. R. 1914 Bom. 127 = 27 I. C. 830.

(6) A. I. R. 1925 Cal. 907 = 89 I. C. 635 = 53 Cal. 166 (F.B.).

(7) [1920] 43 Mad. 675 = 58 I. C. 871.

(8) A. I. R. 1914 Bom. 27 = 38 Bom. 194 = 23 I. C. 123.

(9) [1917] 44 Cal. 627 = 35 I. C. 856.

(10) A. I. R. 1929 Bom. 217 = 118 I. C. 700.

(4) A. I. R. 1929 P.C. 289 = 118 I.C. 7 (F.C.).

the order in C. M. P. No. 107 of 1924 was the only reasonable way of carrying out the consent decree. A decree which directs the delivery of trust property to new trustees is perfectly correct: *Jai Narain v. Bankey Lal* (11), *Ghazaffar Hussain Khan v. Yawar Hussain* (12). In the latter case at p. 117 it is stated as follows:

"A suit instituted under S. 539 is not a suit in which the plaintiffs claim or can claim for themselves possession of trust property. They merely ask the Court to vest the trust property in trustees duly appointed to manage the trust and to take it out of the hands of the trustees who have been guilty of mismanagement. No change in the beneficial ownership is sought. The Court has undoubtedly power under the section to vest the trust property in the new trustees and it seems to me reasonably clear that the Court may direct a trustee who is being removed from the trusteeship to make over the trust property to the new trustee or trustees."

It is clear that such a decree is an executable one and not merely declaratory: *Balakrishna Chettiar v. Krishnamurthi Ayyar* (13). In *Miyaji v. Ahmad Sahib* (14) it was held that it is competent to the Court in a suit under S. 14, Religious Endowments Act, to direct the removal of a trustee and to order a person competent to appoint a new trustee to make such appointment and to direct the trustee removed to surrender possession of property and pay any damages decreed to the new trustee to be appointed. In *Gnana Sambanda Pandara Sannadhi v. Kandaswami Thambiran* (15) it was held that if the power of appointment of a trustee is vested in any person, such person may be directed to make the appointment and possession may be delivered to him.

In my view the order of the learned Subordinate Judge was clearly wrong and must be reversed and this appeal allowed with costs. The lower Court will restore the petition to the file and dispose of it according to law.

Walsh, J.—I agree and have nothing to add.

P.R.S./B.V.

Appeal allowed.

(11) [1919] 58 I. C. 566.

(12) [1905] 28 All. 112=(1905) A.W.N. 208.

(13) A. I. R. 1927 Mad. 416=100 I. C. 841.

(14) [1908] 31 Mad. 212=18 M. L. J. 205.

(15) [1887] 10 Mad. 375.

* * A. I. R. 1932 Madras 44

WALLACE AND STONE, JJ.

Mayandi Asari and others—Defendants
—Appellants.

v.

Sami Asari—Plaintiff—Respondent.

Appeal No. 342 of 1925, Decided on 2nd April 1931, against decree of First Addl. Sub-Judge, Madura, in O. S. No. 20 of 1923.

(a) Evidence Act (1872), Ss. 112 and 3—**Birth during continuance of valid marriage proved—Party challenging legitimacy must prove non-access so far as they reasonably can.**

Although when birth during continuance of valid marriage is proved, S. 112 lays a heavy burden on the party challenging legitimacy to prove non-access; such proof is not different from any other species of proof under the Act. Consequently when after considering the matters before it the Court either believes that there was non-access, or considers its existence so probable that a prudent man ought in the circumstances of the particular case to act upon the supposition that it existed non-access may be considered to have been proved. [P 45 C 1]

* * (b) Evidence Act (1872), Ss. 112 and 120—**Mother is competent witness for proving legitimacy.**

There is nothing contrary to law in the mother herself giving evidence on a point regarding the legitimacy of the child or non-access, since it is not the law in this country that a wife is not a competent witness as to access or non-access by her husband: 38 Mad. 466 and 18 Bom. 468, Ref. [P 46 C 2]

K. V. Krishnaswami Ayyar and R. Ramasubba Ayyar—for Appellants.

K. Rajah Ayyar and S. Venkatesh Ayyangar—for Respondents.

Wallace, J.—This appeal is against the decision of the First Additional Subordinate Judge of Madura in a suit for a declaration of title and recovery of possession of property. The plaintiff sued for the property of one Karuppanan Asari, deceased, whose son he claimed to be. The contesting defendants denied his paternity, and the main issue in the case was that question. The lower Court held that the plaintiff's mother, defendant 11, had been living apart from Karuppanan, her husband, for some years before his death and for some years before the plaintiff's birth, that she was unfaithful to her husband, but that, as the plaintiff was born during the period of continuance of the valid marriage between his mother and Karuppanan Asari, and as the defendants had not succeeded in proving non-access at or about the time when the plaintiff might have been conceived, the plaintiff was entitled under

S. 112, Evidence Act to be declared the son of Karuppanan. It therefore gave him a decree. Defendants 1 to 10 appeal.

In appeal it is contended that the lower Court has so interpreted S. 112 as to place an unfair burden on the appellants which it is practically impossible for them to discharge. The lower Court found that defendant 11 had been long living apart from her husband, that in fact she was living with some paramour at Melur, but held that, as Melur is only nine miles from Karuppanan's village Porusupatti, and as Karuppanan used occasionally to go to Melur to buy cattle in the market, it cannot be said that he had no opportunity of access to her at time of the plaintiff's conception. It is plain that S. 112 lays a heavy burden on the contesting defendants, the burden of proving or "showing" non-access, but such proof is not different from any other species of proof under the Evidence Act, namely :

"when after considering the matters before it the Court either believes,"

that there was non-access :

"or considers its existence so probable that a prudent man ought in the circumstance of the particular case to act upon the supposition that it exists S. 3, Evidence Act."

It is not necessary in fact it is not possible in most cases, for a party to prove a negative by positive evidence and the test laid down by the lower Court comes very nearly to insisting on positive proof of a negative. Putting the most reasonable interpretation on the lower Court's proposition, it amounts to this : that non-access cannot be proved so long as the parties are within reasonable distance of each other, unless there is the evidence of a witness available who can account for every minute of the parties' time, which is of course practically impossible. It is the more necessary not to interpret S. 112 in such an unreasonable fashion in this country because here among the majority of Hindus a valid marriage once contracted cannot be dissolved and therefore "continues" until the death of one party to it. In the circumstances of this case we have no hesitation in holding that the lower Court's view that the legal burden on the appellants has not been discharged is wrong.

The suggestion that Karuppanan and defendant 11 might have met at Melur is no part of the plaintiff's case. His case is that defendant 11 never left her

husband's house. Karuppanan's habit of visiting the Melur cattle market was put forward so casually in the cross-examination of one or two witnesses for the contesting defendants that no suggestion was even put to any of them that Karuppanan ever was in the village at the same time as defendant 11 or ever met her there. Defendant 11 herself of course never suggested that, since it is not her case. The possibility of access in Melur, accepted by the lower Court as a fact, therefore was one not put forward by either side. The appellants had succeeded in proving that defendant 11 had been driven out of her husband's house and had been living apart from him for years, that he had married again, that his visits to Melur were for the purpose of buying cattle and the plaintiff had not suggested that he ever met defendant 11 at Melur. In these circumstances we think that the appellants had discharged the onus of proving non-access sufficient to throw on to plaintiff the onus of proving access.

It is claimed for the plaintiff here, as part of his answer to the appellants' claim, that the evidence adduced is enough to prove access ; but there are many points which go to establish rather the truth of the appellants' contention. The strongest point to our mind is the admission of defendant 11 herself on two occasions that the father of the plaintiff was not Karuppanan but one Muthuswami Asari of Melur. In a guardianship proceeding, after Karuppanan's death, by one Ganapathi Asari, the husband of Karuppanan's sister, asking that he be appointed guardian of the minor plaintiff, defendant 11, filed a written statement, Ex. 4, dated 31st July 1922, stating in categorical terms, what is the present case of the appellants, that she 'had left Karuppanan eight years before, had lived in concubinage first with one Sivan Asari of Madura and then with Muthuswami Asari of Melur, and that the plaintiff was the son of the latter. She repeated this statement in an affidavit, Ex. 7-a 22nd August 1922. Later on in those proceedings she attempted to withdraw Ex. 4 : see Ex. 8, but the District Judge would not allow her : see Ex. 9. Her present explanation of these statements is that she was induced by her brothers to sign blank papers and that she does not know what they put on

them. Such an explanation cannot be accepted. Ex. 4 is countersigned by her vakil in the guardianship proceedings, and it is ridiculous to suggest that it was not read over to her or that she did not know the contents. No sort of reasonable explanation is now advanced why she should falsely swear away her own chastity, and we cannot believe that she would have made such statements unless they were true or unless some severe physical coercion were used to her, which is not pleaded. It is urged and is no doubt the case that prior to the guardianship proceedings she had applied for a transfer of Karuppanan's patta in the name of the plaintiff. In the end that was refused. It is pointed out that in the patta transfer proceedings two village officers supported her claim: see Ex. C. That may have been so then, but the plaintiff has not chosen to examine these village officers in this case. If they really knew the facts to be as he says they would be excellent witnesses.

Other facts point the same way. For example, that, as his mother admits, the plaintiff was born neither in the family house nor in her parent's house; that she must have been pregnant with the plaintiff at the very time when Karuppanan was marrying a third wife, that neither defendant 11 nor plaintiff was present as a member of the family in a family photograph, for which omission illness and absence from the family house are her only excuse, and finally her omission to send any reply to an accusation of excommunication and evil living, to very much the same effect as her own previous statements, contained in a reply notice of the appellants, Ex. 13, dated 25th February 1922. It is a circumstance worth comment that when the plaintiff put his mother into the witness box he did not elicit from her any answer as to who was his father. The only document relied on by the plaintiff is the birth register, Ex. E, which only proves that some informant then gave the name of Karuppanan Asari as the father of the boy registered there. Such evidence is of little value towards proving who was the father, since the plaintiff did not examine the informant in the lower Court.

With all these undeniable facts in support of the appellants' case that Karuppanan Asari was not the father of the

plaintiff, the oral evidence adduced by the plaintiff to prove that his mother never left the family protection cannot be accepted, and we endorse the lower Court's rejection of that. Incidentally we may point out that there is nothing contrary to law in the mother herself giving evidence on a point of this kind, since it is not the law in this country that a wife is not a competent witness as to access or non-access by her husband: see *John Howe v. Charlotte Howe* (1) and *Rozario v. Ingles* (2). There was therefore no legal objection to the admissibility of her evidence or of her previous statement.

The weight of evidence is decidedly in favour of the view that the defendants have proved so far as they reasonably can, non-access; and the lower Court's application of S. 112 is in our view not reasonable. We hold that the plaintiff is not the son of Karuppanan Asari. We reverse the decree of the lower Court and dismiss the plaintiff's suit with costs in both Courts. Plaintiff will pay the Court fee due to Government.

P.R.S./V.B.

Suit dismissed.

(1) [1913] 38 Mad. 466=21 I.C. 645.

(2) [1894] 18 Bom. 468.

* * A. I. R. 1932 Madras 46

REILLY AND

ANANTAKRISHNA AIYAR, JJ.

P. R. M. P. R. Perichiappa Chettiar—
Petitioner.

v.

Nachiappan—Respondent.

Civil Misc. Petn. No. 3539 of 1930, Decided on 16th October 1930, for leave to appeal to His Majesty in Council against decree of High Court in Appeal No. 10 of 1928.

(a) Civil P. C. (1908), S. 110—Decree for payment of certain amount after taking accounts is one and not series of decrees.

A decree for the payment of a certain amount, which is the result of taking an account, is one decree, and not a series of decrees merely because it is the result of decisions in respect of a number of items. If the High Court's decree in such a case does not entirely affirm the decision of the Court immediately below it, then it is not an affirming decree within the meaning of S. 110. [P 48 C 1]

(b) Civil P. C. (1908), Ss. 109 and 110—High Court is bound by plain words of S. 110.

Section 110 is a proviso to S. 109. The High Court is bound by the plain words of S. 110 and

is not at liberty to read into it any words which are not to be found there actually or by necessary implication. [P 52 C 1]

(c) Interpretation of Statutes—Proviso—Proviso must be restricted to the scope reasonably conveyed by words used therein.

It is a rule of law that a proviso should receive a strict construction. It is not open to the Court to add words to a proviso with a view to enlarge the scope of the proviso. The proviso must be restricted to the scope reasonably conveyed by the words used therein. [P 52 C 1]

(d) Civil P. C. (1908), Ss. 109 and 110—Petitioner prima facie satisfying conditions prescribed by S. 109—High Court is bound to grant leave—Chance of success immaterial.

Where a petitioner is given a right of appeal to the Privy Council and he prima facie satisfies the conditions prescribed by S. 109 it is the duty of the High Court to grant him leave to appeal in such a case. The chance of success of the appellant in the proposed appeal is not material. [P 52 C 1]

* * (e) Civil P. C. (1908), S. 110—Value of subject matter of suit and appeal over Rs. 10,000—High Court substantially varying decision of trial Court—Leave to appeal to Privy Council must be allowed although no question of law is involved.

The Privy Council will not ordinarily interfere with concurrent findings of facts arrived at by Courts in India on any particular point; yet if the decree of the High Court did not affirm the decision of the trial Court, and if the value of the subject matter of the suit in the trial Court and in the appeal to the Privy Council be Rs. 10,000, or upwards, a party desirous of appealing to the Privy Council would seem to be entitled to leave to appeal from the decree of the High Court under S. 110, Civil P. C.

A instituted a suit for accounts against his agent valuing his claim at Rs. 40,000. The trial Court passed a decree for a sum of Rs. 5,682 only. The defendant appealed against the decree and A filed memorandum of objections claiming a decree for further amount and valuing his memorandum of cross-appeal at Rs. 20,000. The High Court allowed the defendant's appeal in part and reduced the amount decreed by the trial Court by Rs. 4,000, the cross-appeal by A was allowed to a small extent by Rs. 150 and was dismissed as regards the balance of the amount claimed.

Held: that A was entitled to leave under S. 110 to appeal to the Privy Council. The High Court substantially varied the decree of the trial Court to the prejudice of A: *A. I. R. 1925 P. C. 60, Foll.; 8 C. W. N. 294 treated as Overruled by A. I. R. 1925 P. C. 60.* [P 51 C 2]

* (f) Principal and Agent—Suit for accounts—Each objection raised by a party is not different subject matter and decree passed cannot be taken to be several decrees relating to several subject matters—Civil P. C. (1908), S. 110.

In a suit for accounts by the principal against his agent, it cannot be said that each objection raised by the plaintiff or the defendant to the commissioner's report is a different subject matter or that a decree passed in such a suit should be taken to be several decrees relating to several subject matters but written in one piece of paper. So also, different items in dispute bet-

ween the parties to such a suit do not constitute separate subject matters. [P 52 C 2]

K. V. Krishnaswamy Ayyar and *K. V. Srinivasa Ayyar*—for Petitioner.

T. V. Muthukrishna Ayyar—for Respondent.

Reilly, J.—I have had the advantage of reading the judgment which my learned brother is about to deliver and with which I entirely agree.

Section 109 (a), Civil P. C., gives a right of appeal to His Majesty in Council from any decree made on appeal by a High Court. S. 110, Civil P. C., qualifies that right of appeal by making two exceptions to it. First there is no appeal under S. 109 (a) if the amount or value of the subject-matter of the suit in the Court of first instance or in dispute in the proposed appeal is less than Rs. 10,000 and the decree does not involve directly or indirectly some claim or question to or respecting property of that amount or value. Secondly there is no appeal under S. 109 (a) if the decree of the High Court affirms the decision of the Court immediately below the High Court and the proposed appeal does not involve any substantial question of law. These two exceptions, as they partially take away the right of appeal given by S. 109 (a), must be strictly construed. In the present case prima facie there is no difficulty in respect of the first exception, as admittedly the amount of the subject-matter of the suit in the Court of first instance and in the proposed appeal is over Rs. 10,000.

It is not suggested that the proposed appeal involves any substantial question of law; but the petitioner will be entitled to appeal if the decree of the High Court did not affirm the decision of the Subordinate Judge. At one time it was held by the Calcutta High Court that, even when a decree of that Court had modified a decree of the lower Court on appeal, it was an affirming decree for the purpose of S. 110, Civil P. C., so far as it agreed with the decision of the lower Court, and that, if the proposed appeal to His Majesty in Council referred only to that part of the decree, some substantial question of law was necessary to give a right of appeal. That view, which it may be pointed out involved the implication of words not found in S. 110, was taken in *Rajah Sree Nath Roy Bahadur v. Secy. of State* (1) and *Annapurna Bai v. Rup.*

(1) [1904] 8 C. W. N. 294.

rao (2), but has been shown to be incorrect by the decision of the Judicial Committee in the latter case. Although that implied extension of the exceptions to S. 109 (a) is no longer possible, it is urged for defendant 2 that we are still entitled to effect a different extension of the exceptions by reading the last clause of S. 110 as if it ran:

"provided that, so far as the decree or final order appealed from in respect of any separable part of the case affirms, etc."

and that, if that part involves no substantial question of law, it should be excluded in calculating the necessary Rs. 10,000. That view appears to have been taken in *Narendra Lal Das v. Gopendra Lal Das* (3) and *Kapurji Magniram v. Pannaji Debichand* (4). But with great respect I am not prepared to follow those decisions. If a decree is really a composite decree or a series of decrees dealing with what should strictly be the subject of separate suits, e. g., a decree dealing with alienations in favour of different defendants, which by long-established practice we have allowed to be made the subject of one suit, then it may be proper to separate each decree of the series for the purpose of appeal to His Majesty in Council. But apart from that in my opinion we are bound by the plain language of S. 110, Civil P. C., and are not at liberty to read into it any words which are not to be found there actually or by necessary implication. A decree for the payment of a certain amount, which is the result of taking an account, is one decree, and not a series of decrees merely because it is the result of decisions in respect of a number of items. If the High Court's decree in such a case does not entirely affirm the decision of the Court immediately below it, then it is not an affirming decree within the meaning of S. 110, Civil P. C.

I agree that in this case we must certify that the amount of the subject matter of the suit in the Court of first instance and the amount of the subject matter in dispute in the proposed appeal to His Majesty in Council are each over Rs. 10,000 and that the decree of this Court did not affirm the decision of the Subordinate Judge.

Anantakrishna Aiyar, J.—The petitioner, who is the plaintiff in the original suit, being desirous of appealing to His Majesty in Council against the decision of this Court in Appeal No. 10 of 1928 has filed the present application under S. 109, Cl. (a), and S. 110, Civil P. C., for the necessary certificate.

He instituted the Original Suit No. 2 of 1924 in the Court of the Subordinate Judge of Sivaganga for a decree directing defendant 1, his agent, to render accounts for the period of his agency in the plaintiff's firm at Soomangai in Burma and to hand over to the plaintiff all documents relating to the agency and for the recovery of the amount found due on taking accounts. He valued the claim in the suit at Rs. 40,000. In pursuance of a preliminary decree passed by the Court, accounts were taken by a commissioner, and after hearing the objections filed by the parties to the commissioner's report, the trial Court, on 28th November 1927, passed a decree in favour of the plaintiff for a sum of Rs. 5,682-6-11 with interest thereon, to be recovered from the assets of the deceased defendant 1 (defendant 1 having died in the meantime and defendant 2 having been brought on as the legal representative of defendant 1 as defendant 1's adopted son). Against that decree, defendant 2 preferred appeal No. 10 of 1928 to the High Court and the plaintiff preferred a memorandum of objections to the High Court claiming a decree for a further amount and valued his memorandum of cross-appeal at Rs. 20,000.

When the appeal and the cross-appeal came on for hearing, the High Court allowed defendant 2's appeal in part and reduced the amount decreed by the trial Judge by about Rs. 4,000; the cross-appeal preferred by the plaintiff was allowed to a very small extent—namely, to the extent of about Rs. 150, and the cross-appeal in respect of about Rs. 19,850 (out of the Rs. 20,000 claimed in it) was dismissed. The result therefore is that whereas the trial Court gave the plaintiff a decree for about Rs. 5,000 odd with interest thereon, according to the decree of the High Court—the plaintiff gets a decree only for about Rs. 2,000 with interest thereon. The plaintiff in these circumstances has applied for leave to appeal to the Privy Council, and the question for considera-

(2) A. I. R. 1925 P. C. 60=86 I. C. 504=51 I. A. 319=51 Cal. 969 (P. C.).

(3) A. I. R. 1927 Cal. 543=103 I. C. 65.

(4) A. I. R. 1929 Bom. 359=119 I. C. 771.

tion is whether he is entitled to a certificate as a matter of right.

It was argued on behalf of the petitioner (the plaintiff) that the value of the subject-matter of the suit in the Court of first instance was upwards of Rs. 10,000 (the plaint was in fact valued at Rs. 40,000) and that the amount in dispute on appeal to His Majesty in Council is also upwards of Rs. 10,000 (it is more than Rs. 20,000), and that the decree of the High Court did not affirm the decision of the trial Court. He therefore claims a certificate as a matter of right. On behalf of defendant 2 (respondent in this petition), his learned advocate argued that the question in dispute between the parties related really to various items in the account rendered by the agent, that the value of none of the items exceeded Rs. 10,000, and that, as the High Court has confirmed the findings of the trial Court on all the items excepting a very few, and even the total amount involved in the items in respect of which the High Court differed from the trial Court is very much less than Rs. 10,000 (the amount comes to only about Rs. 4,000) the present is a case of concurrent findings on questions of fact; and he urged that except with reference to about Rs. 4,000 the High Court affirmed the decision of the trial Court in respect of all the items, and that consequently the plaintiff is not entitled to a certificate as of right. In support of this contention, the learned advocate referred us to two decisions of this Court: one reported in *Ramanathan Chetti v. Subramanian Chetti* (5) and the other an unreported one of a Bench of this Court in *C. M. P. 1674 of 1928*. We were also referred to a decision of the Calcutta High Court reported in *Narendra v. Gopendra* (3) and another of the Bombay High Court reported in *Eapurji v. Pannaji* (4).

On the other hand we were referred to a decision of the Privy Council reported in *Annapurnabai v. Rup Rao* (2). The question before the Privy Council arose in this way. The plaintiff instituted a suit in the District Court of Amraoti against the defendants for possession of half of the estate of a deceased person alleging that he had been adopted by the senior widow of the deceased and denying the alleged adoption of defendant 2,

defendant 1 being the junior widow of the deceased. The trial Court held that the plaintiff's adoption was proved, that the alleged adoption of defendant 2 was not proved, but held that the plaintiff was bound to provide maintenance for defendant 1 at the rate of Rs. 800 per annum, which was to be a charge upon the estate. On appeal the decree of the trial Court was modified by increasing the maintenance from Rs. 800 to Rs. 1,200 per annum in all other respects the decree was confirmed. The defendants' application to the appellate Court for leave to appeal to the Privy Council was dismissed on the ground that

"the decree of the trial Court had been affirmed except in respect of a 'small change' in favour of the defendants and that no question of law was involved."

The defendants applied to the Privy Council for special leave to appeal urging that the appellate Court was in error in having refused leave, it being urged that as the decree of the appellate Court did not affirm the decision of the trial Court the defendants were entitled as of right to leave to appeal, the value of the subject-matter of the suit exceeding Rs. 10,000 as also the value of the subject-matter of the proposed appeal. It was also contended that it was not material under the circumstances whether any substantial question of law was involved in the proposed appeal or not. The appellants desired however to appeal only with regard to the amount of the maintenance which was claimed at Rs. 3,000 per annum, and they did not desire to appeal with regard to the other portions of the decree, having regard to the concurrent findings against them on the question of adoption by both Courts in India. The Privy Council held that the contention of the defendants as to the effect of S. 110 of the Code was correct, and that they had therefore a right of appeal. Special leave to appeal was granted, but was limited to the question of maintenance. Their Lordships also remarked as follows: "The petitioner's chance of success is not material to their application." Prima facie therefore when the decree appealed from does not affirm the decision of the Court immediately below, if the amount or value of the subject-matter of the suit in the trial Court be Rs. 10,000 or upwards, as also the amount or value of the subject-matter in

(5) A. I. R. 1946 Mad. 1024=97 L. C. 592.

dispute on appeal to His Majesty in Council, the petitioner would be entitled as of right to leave to appeal to the Privy Council.

But it was argued that when there were concurrent findings of fact with reference to some of the items included in the valuation, the decree of the appellate Court should be taken to affirm that portion of the decree of the trial Court relating to those items, and that unless a substantial question of law be involved in the proposed appeal to the Privy Council, in so far as those items are concerned, the value of those items should not be taken into account in considering the valuation of the subject-matter of the appeal to the Privy Council, and that only the amounts involved in the other items in respect of which the decision of the trial Court was reversed by the High Court should be taken into account in considering the limit of Rs. 10,000 prescribed by S. 110 of the Code. In support of this contention reliance was placed on the decision reported in *Ramanathan Chetti v. Subramanian Chetti* (5). That was a decision of Phillips and Odgers, JJ., and their Lordships refused leave to appeal to the Privy Council in that case. In a later case, reported in *Sundara Mudaliar v. Ratnavelu Mudaliar* (6) in which the same learned Judges granted leave to appeal to the Privy Council, their decision in *Ramanathan Chetti v. Subramanian Chetti* (5) was distinguished in these terms :

"There the memorandum of cross-objections related to a matter entirely distinct from the subject-matter of the appeal : see page 526."

It would seem that in the High Court the petitioner's appeal was dismissed whereas the memorandum of objections filed by the respondents was allowed and the lower Court's decree modified to the extent of about Rs. 300 in respect of some rent disallowed in the trial Court: see p. 296 (of 51 M. L. J.) *Ramanathan Chetti's* case (5). We may here observe that the question for decision in *Sundara Mudaliar v. Ratnavelu Mudaliar* (6) arose in a suit for a general account against a trustee, and the suit out of which the application before us has arisen was also a suit for a general account against an agent. The only other decision of this Court to which our

attention was drawn is that passed by Ramesam, J., and Wallace, J., in C. M. P. 1674 of 1928 (unreported). It related to a suit by a reversionary heir to set aside various alienations made by a Hindu widow and to recover possession of the items from the various alienees, the widow having died just prior to the suit. The trial Court held against the validity of some of the alienations, but the High Court on appeal reversed the decision of the trial Court with reference to some of the alienations while confirming it as regards others. The plaintiff applied for leave to appeal to the Privy Council and relied on *Annapurnabai v. Ruprao* (2). Their Lordships refused leave, and observed as follows :

"The leave to appeal now applied for relates to items 5, 6, 7, 8, 9 and 10. Of these items, the judgment of the High Court affirms the judgment of the trial Court as to items 5, 6, 7, 8 and 10. As to item 9, it is a reversing judgment, but taken separately its value is not above Rs. 10,000. The learned advocate for the petitioners referred to *Annapurnabai v. Ruprao* (2) and *Sundara Mudaliar v. Ratnavelu Mudaliar* (6). But these cases do not help him. In those cases, the subject matter of the appeal could not be split into parts, and it could not be said that it was partly an affirming judgment and partly a reversing judgment. They were cases of modifying judgments and therefore not cases of affirming judgments. The reasoning in *Sundara Mudaliar v. Ratnavelu Mudaliar* (6) shows that the subject matter of the litigation can be split up into separate parts. The principle of affirming and reversing judgments should be separately applied to each of these parts. Holding that there was no substantial question of law, the application for leave was dismissed. A suit to set aside various alienations made by a Hindu widow should really be taken to be a suit relating to different subject matters, the subject matter of each alienation being different though, as observed by Sir V. Bhashyam Ayyangar in the case reported in *Dampanaboyina Gangi v. Addala Ramaswami* (7), at p. 745, a course of decisions in this Presidency has held that such a suit is not open to the objection of misjoinder of parties and of causes of action when the plaintiff's ground of title to all the properties included in the suit is the same."

In our view it could not be said that different items in dispute between parties in a suit by a principal against his agent for an account constitute separate subject-matters in the sense contemplated by the learned Judges in C. M. P. 1674 of 1928. No other decision of this Court was brought to our notice. Two decisions of the Calcutta High Court were relied on by the learned advocate for the respondent. In *Sree Nath v. Secy. of State* (1), a Bench of three learned

(6) A. I. R. 1929 Mad. 429=121 I. C. 16=52 Mad. 521.

(7) [1902] 25 Mad 736=12 M.L.J. 103.

Judges of the Calcutta High Court declined to grant leave to appeal to the Privy Council in a land acquisition case where an applicant claimed Rs. 77,000 before the Collector who assessed the value of the land at Rs. 28,287. The District Judge on a reference to him upheld the Collector's award. The applicant then appealed to the High Court valuing his appeal at Rs. 49,000 being the difference between the Collector's award and the amount claimed. The High Court allowed the appeal in part by giving the appellant an additional sum of about Rs. 7,000. In these circumstances the appellant applied for leave to appeal to the Privy Council. The Court held that the decree of the High Court was properly one of affirmance of the decree of the first Court as regards the subject matter of the proposed appeal, and as there was no substantial question of law, the application for leave to appeal to the Privy Council was refused. The learned Judges observed as follows :

"The question is whether under these circumstances the decree appealed against affirms the decision of the Court below. No doubt in one sense it may be said that this Court did not confirm the decision of the Court below, because it gave the petitioner an additional Rs. 7,000 ; but we must look to the substance of the case. What is the decree from which the present applicant now desires to appeal to the Privy Council ? He desires to appeal only against the decision of this Court so far as it affirmed the decision of the Court below ; nothing else. This seems to be, in substance, as far as the subject matter of appeal goes, a decree of affirmance. If the decree of this Court had been properly drawn, it would have dismissed the appeal except to the extent that the additional sum was given. In other words, whilst the decree of this Court modifies, in the petitioner's favour, the original decree, as regards the subject matter of the proposed appeal to His Majesty in Council it most certainly affirmed the decree of the first Court. No question of law is involved. The application is refused."

This decision was passed in 1904 ; and after the decision of the Privy Council given in 1924 in the case reported in *Annapurnabai v. Ruprao* (2), the decision in *Sree Nath v. Secy. of State* (1) could not be said to represent the law on the point correctly and must be taken to have been overruled by the decision of the Privy Council. The decision in the other case cited for the respondent, viz., *Narendra v. Gopendra* (3) was passed in 1927. The learned Judges remarked that the Privy Council decision in *Annapurna-*

bai v. Ruprao (2) has not overruled the principle that if on an examination of the subject matter that is to be in debate before the Privy Council it be found that on that point the two Courts have been in agreement, the decree of the appellate Court is to be treated as a decree of affirmance within the meaning of S. 110, Civil P. C., that for leave to appeal to the Privy Council in such a matter, the applicant has to prove a substantial question of law, and that the Privy Council has only decreed that the particular application of the doctrine in *Sree Nath v. Secy. of State* (1) was erroneous. The learned Chief Justice remarked as follows at p. 576 :

"I do not think that the decision shows that it is an erroneous view that we have to look to the substance and see what is the subject matter of the appeal to His Majesty in Council. I have, I confess, some doubt as to whether in the end even that principle would be found to be in accordance with the construction to be put upon S. 110, but this Court and other High Courts have for many years acted upon that principle."

Similarly in *Kapurji v. Pannaji* (4), it was held that it was not enough to entitle the applicant to a certificate under S. 110, Civil P. C., that the decree of the lower Court is varied by the High Court on points not covered by the appeal to the Privy Council.

In our present case, in respect of a portion of the subject matter of the appeal to the Privy Council the High Court substantially varied the decree of the trial Court to the prejudice of the petitioner. Further, it is not quite correct to say with reference to the decision in *Annapurnabai v. Ruprao* (2) that the appeal to the Privy Council was limited by the Privy Council—against the wishes of the appellants—to the question of maintenance allowance. The appellants appealed against the whole decree ; but, having regard to the concurrent findings of fact on the question of adoption, their learned counsel desired special leave to appeal only with reference to the question of maintenance. It would therefore appear that it is not a case where their Lordships limited special leave to the question of maintenance only, on their own accord ; they intimated that in the circumstances special leave to appeal should be granted but should be limited to the question of maintenance, evidently to give notice of that circumstance to the respondents who did not then appear be-

fore their Lordships. This would seem to follow from what their Lordships say about the construction of S. 110, Civil P. C. The argument advanced on behalf of the respondent necessitates that very many words should be implied in S. 110 to justify the interpretation of the section contended for by him. We feel that it is not open to us to do so. S. 109 gives a right of appeal to the Privy Council. S. 110 is a proviso to S. 109. It is a rule of law that a proviso should receive a strict construction. It is not open to the Court to add words to a proviso with a view to enlarge the scope of the proviso. The proviso must be restricted to the scope reasonably conveyed by the words used therein.

Turning to the other Courts: the decision in *Kamal Nath v. Bithal Das* (8) was before the decision of the Privy Council in the case reported in *Annapurnabai v. Ruprao* (2). The decision of the Patna High Court in the case reported in *Jamna Prasad Singh v. Jagannath Prasad* (9) supports the contention of the petitioner before us. There the learned Judge observed as follows with reference to the decision reported in *Narendra v. Gopendra* (3). In *Narendra v. Gopendra* (3) Sir George Rankin, C. J., says:

"I have, I confess, some doubt as to whether in the end even that principle would be found to be in accordance with the construction to be put upon S. 110, but this Court and other High Courts have for many years acted upon that principle."

The learned Chief Justice there felt that the limitation placed upon the construction of the section is not in consonance with the language used in the statute. *Bhagwan Singh v. Bhawani Das Bhagwan Das* (10), *Venkat Narayana v. Lakshmibayamma* (11) and *Jumna Prasad v. Jagannath* (9) were also cited on behalf of the petitioner.

When a petitioner is given a right of appeal to the Privy Council, and he prima facie satisfies the conditions prescribed by the section, we think it is our duty to grant him leave to appeal in such a case. As remarked by the Privy Council, 'the chance of success of the appellant in the proposed appeal to the

Privy Council is not material' to such an application for leave. The Privy Council has repeatedly remarked in several cases that as regards the amount of maintenance to be decreed to a litigant in India, the Privy Council will not ordinarily interfere, and yet the Privy Council granted leave to appeal in the case reported in *Annapurnabai v. Ruprao* (2) regarding the amount of maintenance. The Privy Council will not ordinarily interfere with concurrent findings of facts arrived at by Courts in India on any particular point; yet if the decree of the High Court did not affirm the decision of the trial Court, and if the value of the subject matter of the suit in the trial Court and in the appeal to the Privy Council be Rs. 10,000 or upwards, a party desirous of appealing to the Privy Council would seem to be entitled to leave to appeal from the decree of the High Court under S. 110, Civil P. C., as interpreted by the Privy Council in the case reported in *Annapurnabai v. Ruprao* (2), though no substantial question of law is involved in the proposed appeal. In the present case, the decree of the High Court worked to the prejudice of the present appellant (the petitioner before us) to the extent of about Rs. 4,000, and thus the decree of the appellate Court substantially varied the decree of the trial Court to the prejudice of the petitioner (the appellant in the proposed Privy Council appeal). We are not here concerned with a case of a mere formal or immaterial alteration of the trial Court's decree by the appellate Court. Nor are we here concerned with a case where the appellate decree modified the decree of the first Court only in respect of costs. The modification in the present case being substantial and against the appellant, we are unable to say that the decree of the High Court affirmed the decree of the trial Court. Further, in a suit for an account by the principal against his agent, it could not, in our opinion, be said that each objection raised by the plaintiff or the defendant to the commissioner's report is a different subject-matter, or that a decree passed in such a suit should be taken to be "several decrees relating to several subject-matters, but written in one piece of paper" as argued for the respondent.

The proposed appeal to the Privy Council is not only against that portion

(8) A. I. R. 1922 All. 89=64 I. C. 916=44 All. 200.

(9) A. I. R. 1929 Pat. 561=117 I. C. 193.

(10) A. I. R. 1921 All. 270=64 I. C. 3=43 All. 220.

(11) A. I. R. 1929 Mad. 309=116 I. C. 129.

of the decree of the High Court which modified the decree of the trial Court to the extent of about Rs. 4,000 to the prejudice of the petitioner, but is also against that portion of the decree of the High Court which dismissed the cross appeal (memorandum of objections) filed by the petitioner to the extent of more than Rs. 19,000. The value of the subject-matter of the appeal to the Privy Council is thus much more than ten thousand rupees and not being an affirming decision, it is not incumbent on the petitioner to show that there is a substantial question of law involved in the proposed appeal. The section gives us no discretion in the matter in such circumstances; though there is no substantial question of law involved in the proposed appeal to His Majesty in Council, the condition relating to valuation has been satisfied, and the decree of the High Court did not affirm the decision of the trial Court.

In my opinion, the appellant is entitled to leave under S. 110, Civil P. C., construed in the light of the decision of the Privy Council in the case reported in *Annapurnabai v. Ruprao* (2); and we accordingly certify that the value of the subject-matter of the suit in the trial Court was more than Rs. 10,000 and that the value of the subject-matter of the appeal to the Privy Council is also upwards of Rs. 10,000, and that the decree of the High Court in appeal did not affirm the decision of the trial Court.

A certificate will be issued to the petitioner accordingly.

P.R.S./R.M. *Order accordingly.*

* * A. I. R. 1932 Madras 53

VENKATASUBBA RAO AND WALSH, JJ.
(Goginoni) Venkatappayya—Plaintiff—Appellant.

v.

(Yerramneni) Ramakristnamma and others—Defendants—Respondents.

Appeal No. 104 of 1926, Decided on 7th October 1931, against decree of Sub-Judge, Guntur, D/- 11th September 1925, in O. S. No. 77 of 1923.

* * (a) Tort—Malicious prosecution—Liability—Every person responsible for prosecution is liable.

Though technically it is the Crown that is the prosecutor in a criminal case, not only is the individual, who sets the law in motion, liable but also every other person whose conduct with reference to the charge or the trial, shows, that

the part taken by him points him out as one responsible for the prosecution. That a particular person figured as a witness in the criminal case is not the criterion, but may be an element to be considered. It is the whole conduct of the party that must be taken into consideration and the question must be determined as a question of fact in each case; 30 All. 525 (P. C.) and A. I. R. 1926 P. C. 46, Appl.

[P 54 C 2]

(b) Tort—Malicious prosecution—Damages—When exemplary.

Where the wounded feeling and injured pride of a plaintiff, or the misconduct of a defendant, may be taken into consideration, the principle of '*restitutio in integrum*' no longer applies. Damages are then awarded not merely to recompense the plaintiff for the loss he has sustained by reason of the defendant's wrongful act, but to punish the defendant in an exemplary manner, and vindicate the distinction between a wilful and an innocent wrongdoer. Exemplary damages are awarded where there is a great injury without there being the possibility of compensation being measured by any numerical rule and are granted to express indignation at the defendant's wrong rather than that they represent the plaintiff's loss. [P 55 C 1]

T. V. Venkatarama Ayyar—for Appellant.

K. Kameswara Rao—for Respondent.

Venkatasubba Rao, J.—In this suit, the plaintiff claims damages for malicious prosecution. His case is, that all the ten defendants along with one T. K. Prasada Rao, a Police Sub-Inspector (D. W. 5), conspired to bring against him a false charge of robbery, that he was thereupon prosecuted but discharged, that the proceedings against him were instituted maliciously and that he is therefore entitled to damages. The lower Court has found that defendant 1 was actively assisted by defendants 2, 4, 7 and 9 as well as Prasada Rao. In the plaint, it is stated, that owing to certain technical reasons, Prasada Rao was not made a party. Although the Judge finds that defendant 1 was aided by defendants 2, 4, 7 and 9, it is only against the first that he has awarded damages. The plaintiff has filed this appeal complaining that the sum of Rs. 500 granted to him as damages against defendant 1 is inadequate and that, on the finding of the lower Court, the other defendants mentioned above, should also have been made liable.

We may shortly state the facts as found by the lower Court, for, with its findings we agree. The plaintiff was the President of the Local Fund Union at Tatikonda, a village in the Guntur District. Some among those ten defendants

stood as candidates for election to that Union and the plaintiff, as its President, rejected the nomination papers of three of those candidates on the ground that they were invalid. The latter thereupon filed a civil suit against the President questioning his act and imputing some misconduct to him. After that case was filed, some of the ten defendants got one Sambasiva Rao, a clerk of the Local Fund Union, to state in writing, that the charges made against the plaintiff in the civil suit were well founded. This happened on 24th July 1923. The plaintiff came to know of this and as a counter-move got the clerk to his office the very next day and made him sign another writing which said, that the charges he made in the first statement were false and that he made them under coercion. This happened at about 9 p. m. on the 25th. The defendants, getting wind of what was going on, joined together and hatched a plot. It was pretended that defendant 2 executed a promissory note in favour of the fourth and borrowed from him a sum of money. Defendant 1 was to profess falsely to have been the messenger who carried the promissory note to the fourth and received from him the sum required. While he was taking this money to defendant 2's house at about 12 o'clock in the night, it was to be given out that the plaintiff and two others suddenly pounced on him and committed robbery. Now, to return to the plaintiff, he left his office at about 9 p. m. with the counterstatement in his hands and when he came right in front of the police station, some of these defendants created a row, which acted as a signal for the Sub-Inspector to come out, and, with his help, they seized the plaintiff, wrested the paper from his hands and pushed him into the station where he was confined in the police lock-up. This occurred not about 12 in the night as pretended by the defence but more in the neighbourhood of 9 o'clock.

The plaintiff was then and there charged with having robbed defendant 1 of the money, which however was not to be seen. To account for its disappearance, it was given out, that there were two other culprits, who, taking advantage of the confusion, ran away with the money. The plaintiff was kept in the lock-up till 4 p. m. on the following day. Then he was sent to some Magis-

trate at Guntur along with two constables acting as his escort. The plaintiff was a man of 53, well placed in life. Nevertheless, he was made to walk the whole distance of ten miles, and reached Guntur only late in the night. The Magistrate could pass orders only the next day and the plaintiff was then released on bail. He suggests, and we think with reason, that such a late hour as 4 o'clock was wantonly chosen, so that he might remain in custody another night. Then, in due course, the plaintiff was charged with robbery and prosecuted and the criminal Court discharged him holding that the case was false.

It follows from what we have stated that the complaint was made maliciously and that the lower Court rightly held defendant 1 liable for damages. His cross-appeal therefore fails and is dismissed without costs.

The next question is, whether the other defendants against whom this appeal is directed are also liable for damages. In *Gaya Prasad v. Bhagat Singh* (1), the defendants, though their names did not appear on the face of the proceedings, except as witnesses, were directly responsible for the charge of rioting made there against the plaintiff, had produced false witnesses to support that charge and had done all they could for the purpose of securing a conviction of the plaintiff, who however was acquitted. It was held by the Judicial Committee that they were rightly found liable for damages in an action for malicious prosecution. The same view was again taken by the Privy Council in a later case in *Balbhadar Singh v. Bhadri Sah* (2). These cases show, that though technically it is the Crown that is the prosecutor in a criminal case, not only is the individual who sets the law in motion liable but also every other person whose conduct with reference to the charge or the trial, shows, that the part taken by him points him out as one responsible for the prosecution. That a particular person figured as a witness in the criminal case is not the criterion, but may be an element to be considered. It is the whole conduct of the party that must be taken into consideration and the question must be

(1) [1908] 30 All. 525=35 I. A. 189=5 A. L. J. 665=11 O. C. 371 (P.C.).

(2) A. I. R. 1926 P. C. 46=95 I. C. 329=29 O. C. 163=1 Luck. 215 (P.C.).

determined as a question of fact in each case.

Judged by this test, there can be no doubt that defendants 2 and 4 are liable. They concocted the promissory note with a view to create in advance false evidence against the plaintiff. This was done before the charge and during the trial they helped defendant 1 by giving false evidence in support of his charge. We therefore hold them liable.

It is next contended by the plaintiff-appellant that he is entitled to substantial damages as the defendants, found liable, grossly insulted and outraged him and harassed him in every possible way. We must uphold this contention.

"Where the wounded feeling and injured pride of a plaintiff, or the misconduct of a defendant, may be taken into consideration, the principle of *restitutio in integrum* no longer applies. Damages are then awarded not merely to recompense the plaintiff for the loss he has sustained by reason of the defendant's wrongful act, but to punish the defendant in an exemplary manner, and vindicate the distinction between a wilful and an innocent wrong doer. The damages so awarded have been variously called exemplary, vindictive, penal, punitive, aggravated, or retributory": 10 Halsbury para. 566.

Among those cases for which such damages may be awarded are mentioned actions for malicious prosecution: see the same paragraph.

Exemplary or vindictive damages are awarded where there is a great injury without there being the possibility of compensation being measured by any numerical rule and are granted to express indignation at the defendant's wrong rather than that they represent the plaintiff's loss: see Pollock on Torts, Edn. 13, p. 193.

The lower Court has fixed the damages at Rs. 500 on the ground that the plaintiff actually spent that sum in defending himself. We are prepared to raise this sum to Rs. 1,500, for, in our opinion, this is a fair estimate, having regard to the nature of the injury and the circumstances which attended it. We pass a decree accordingly for Rupees 1,500 against defendants 1, 2 and 4.

So far as these defendants are concerned, one further question remains. The lower Court has given the plaintiff only proportionate costs on the amount awarded. In such a case as this, the costs to be allowed cannot be made to depend upon the amount decreed. The plaintiff claimed in his plaint Rs. 5,250

and his estimate is not so extravagant that he must be punished by his being deprived of costs. We order that he shall have his full costs of the suit as well as of this appeal from defendants 1, 2 and 4.

Then remains the question as regards the liability of defendants 7 to 9. What the plaintiff urges is, not that they are liable for malicious prosecution, but for false imprisonment. Had this claim been clearly and unequivocally set forth in the plaint, we should probably be disposed to grant the plaintiff damages on this head. But on a careful analysis of the pleadings, we find that the case with which the plaintiff came to Court was not this. As a matter of fact, even the lower Court does not deal with his action as one for false imprisonment. On this ground, the appeal against defendants 7 to 9 is dismissed but without costs.

And the case having been posted for being spoken to this day, the Court made the following.

Order.—We have dismissed the cross-appeal of defendant 1 without costs. But as regards the court-fees due to the Government, we direct him to pay them.

P.R.S./K.N.

Appeal allowed.

* A. I. R. 1932 Madras 55

RAMESAM, OFFG. C. J. AND CORNISH, J.
Secretary of State—Appellant.

v.

R. Narayanaswami Chettiar and others
—Respondents.

Appeals Nos. 217 to 229 and 443 of 1929, Decided on 11th August 1931, against awards of Dist. Judge, Salem.

(a) Madras Town Planning Act (7 of 1920), S. 14(1)—Applicability.

Section 14 (1) applies to draft schemes under S. 11 or S. 12. [P 57 C 2]

(b) Madras Town Planning Act (7 of 1920), S. 35 (2) (a)—What date may be adopted for fixing market value of property acquired stated.

Per Ramesam, Offg. C.J.—The whole policy of the Act is that a reasonable date should be fixed within which the council should submit its scheme and this date should be notified by the Government. If the council submits its scheme within that date, the proceedings will continue with reasonable speed and the owners of lands will have the satisfaction of their lands being acquired and prices given to them corresponding to a date not unreasonably remote from the actual acquisition; but if the delay is committed by the Municipal Council, and if the Government extends the time, for the same reason for which the first notification mentioning a date for the submission of the scheme by

the Municipal Council should be published, there must be a notification containing the second date and this notification should be equally published. The date of such further notification is the date to be adopted under S. 35 (2) (a). [P 58 C 1]

Per *Cornish, J.*—The power to fix a date under S. 12 carries with it a power to extend the date originally fixed, unless there is anything in the Act to the contrary and the Government to fix a date under S. 12 is free from the limitation imposed by S. 11. The fact of the Local Government altering the date originally fixed for submitting a scheme under S. 12 does not affect the date of the notification for the purpose of S. 35 (2). [P 62 C 1,2]

(c) **Land Acquisition Act (1894), Ss. 25 and 49—Judge has discretion to raise question of damages for severance.**

Section 25 gives the Judge discretion to raise a question as to damages for severance before him if sufficient reason is shown though such a claim was not made before the Collector. There is nothing in S. 49 requiring the claimant to put forward the claim that the whole house should be acquired at any particular stage of the proceeding. Cl. 1 of that section cannot be relied on to show that the owner should make this kind of claim before the award is made. [P 61 C 2]

* (d) **Land Acquisition Act (1894), S. 25—Principle for acquisition stated.**

If there is no other place within the compound where a latrine can be built for the use of a house, the owner can reasonably insist on the whole house being acquired. [P 61 C 2]

(e) **Land Acquisition Act (as amended by Act 10 of 1921), S. 49—Order under S. 49 is decree and appealable — Claim under S. 49 may be made after award.**

Section 49 cannot be construed as requiring that an owner must, before the award has been made, express his desire to have the whole of the house or building acquired, though that would be the normal procedure. No doubt the section provides that the owner may withdraw or modify his expressed desire before the award is made. But that does not imply that an owner, who has not made his claim prior to the award can in no circumstances make it afterwards. The decision of the Court upon a reference under S. 49 must be held to be a decree and therefore appealable: *A. I. R. 1922 P. C. 80, Ref.* [P 63 C 1]

Govt. Pleader—for Appellant.

B. Sitarama Rao, K. Bhashyam Ayyanar, V. Ganapathi Ayyar, T. R. Srinivasan, K. R. R. Sastri and K. Sankara Sastri—for Respondents.

Ramesam, Offg. C. J. — These are appeals against the award of the District Judge of Salem made in certain land acquisition proceedings which were taken pursuant to the Town Planning Act 7 of 1920. The scheme was generally known as Maravaneri Extension and was intended to enlarge the accommodation of Salem Town. The facts of the case may now be stated.

On 1st February 1921 the Madras Government invited the Municipal Council of Salem by a notification published in the Fort St. George Gazette to submit for sanction within three months from the date of the publication of the notification a scheme in respect of the area now in question : Ex. A. This was under S. 12, Town Planning Act. That section authorizes the Government to fix a date within which the Municipal Council should submit the scheme and the Government fixed three months as the period. The Salem Municipal Council did not submit their scheme within three months. The draft scheme was submitted on 28th August 1921 : Ex. B. Seeing that the Government ultimately published a notification on 21st September 1923 under S. 14 (3) of the Act (vide Ex. D) we must assume that the Madras Government has accepted the draft scheme though it was submitted late and condoned the delay of the Municipal Council. S. 34, Town Planning Act, provides that a notification under S. 14 of that Act shall operate in respect of any land covered by it as a declaration under S. 6, Land Acquisition Act. So further proceedings were taken under the Land Acquisition Act. An acquisition officer was appointed and he made an award on 2nd September 1926. Many of the claimants were not satisfied with it and required a reference to the civil Court under S. 18, Land Acquisition Act. It was thus that the matter came up before the District Judge of Salem and against his award these appeals are filed by the Government and the claimant.

The District Judge held that as the Salem Municipal Council have not complied with the notification of the Government within three months as required in Ex. A the notification became spent as it were and any action taken by the Municipal Council subsequently for the purpose of settling a scheme and getting the approval of the Government cannot be regarded as one under S. 12, Town Planning Act. He then observed that the Government have no power to extend the time mentioned in the notification and therefore the notification Ex. A has no legal effect whatever ; but he also held that the subsequent proceedings taken under the Act are still valid. He pointed out that apart from the notification under S. 12, the Municipal Council

could suo motu frame a scheme under S. 10 (3) or S. 11 and the Government may approve of the scheme under S. 14 (3) and further proceedings can follow a notification by the Government under S. 14 of the Act. He finally held that though the notification under S. 12 lapsed and there was no notification under S. 10 (1), and therefore S. 35 (2) (a), Town Planning Act cannot be applied, the notification under S. 14 can still be utilized for a date to calculate the values. Under S. 23, Land Acquisition Act, the market value of the land on the date of the publication of the declaration under S. 6 must be taken into consideration. Under S. 34, Town Planning Act the notification published under S. 14, Town Planning Act, is itself deemed to be a declaration under S. 6, Land Acquisition Act. He therefore held that 14th September 1923 the date of Ex. D the final notification under S. 14 must be taken to be the date at which the value of the plots belonging to the claimants should be ascertained and he proceeded to give his award. This conclusion is challenged by the learned Government Pleader. He cited some cases before us to show that the District Judge had no jurisdiction to go behind the reference. But I do not think that this point arises before us. The learned District Judge did not say that the reference to him was invalid, nor is any such proposition contended for by the respondents. The District Judge held that the notification under S. 14 was a valid notification and the further proceedings were valid. All that he said was that there was no notification under S. 10 (1) nor any operative notification, under S. 12, Town Planning Act and therefore S. 35 (2) (a) could not be applied. He therefore chose the notification under S. 14 which is equivalent to a declaration under S. 6, Land Acquisition Act, and proceeded to estimate the value as on that date. It is therefore unnecessary to consider the cases cited by the learned Government Pleader.

The next question is whether there was an operative notification under S. 12 so that we might take its date as the date with reference to which the lands have to be estimated under S. 35 (2) (a), Town Planning Act. Now, taking S. 14 of the Act, Cl. (1) refers to the date of the publication of a draft scheme. It is

clear that there are two draft schemes referred to in the prior sections of the Act, one published by the Municipal Council under S. 11 suo motu and another prepared by the council under S. 12 on the invitation of the Government. It seems as if both the Ss. 13 and 14 were intended to apply to both kinds of draft schemes. But unfortunately S. 12 did not make any provision for the publication of the draft scheme as S. 11 did with the result that the words "the date of the publication of a draft scheme" cannot refer to the publication of a scheme under S. 12. Nevertheless S. 14 (3) may refer to a draft scheme under S. 11 (1) or a draft scheme submitted under S. 12. This is the view adopted by the learned District Judge and also contended for before us by the learned Government Pleader.

I agree with the contention. This defect in S. 12 has since been remedied by an amending Act and now it is clear that S. 14 (1) applies to draft schemes under S. 11 or S. 12 and the original intention is now properly carried out. But this conclusion that S. 14 (3) applies even to a draft scheme prepared suo motu by the Municipal Council and therefore the proceedings under the Town Planning Act are valid does not solve the question of the date of the notification which has to be adopted under S. 35 (2) (a). The District Judge thought that the Government have no power to extend the time mentioned in its notification of February 1921. The learned Government Pleader argues that this view is not correct. To this extent I agree with the learned Government Pleader. In the first place, the Act itself does not fix any period of time before which the scheme must be submitted by the Municipal Council. The date was to be fixed by the Government. The Government had so fixed the date; but the Municipal Council did not submit its scheme within that date. If at this stage the Government sent another communication to the Municipal Council fixing another date and published it by a notification it will be perfectly valid. Only in such a case the date of the second notification would be the date to be adopted under S. 35 (2) (a). Whether we call it an extension of the original date or whether we call it a fresh notification it matters little. But what the

Government Pleader requires for his argument is that while an extension of the original date may be made by the Government, the date of the first notification the time prescribed in which is extended, is still the date to be adopted under S. 35 (2) (a). I am unable to agree with this contention. The whole policy of the Act is that a reasonable date should be fixed within which the Council should submit its scheme and this date should be notified by the Government. If the council submits its scheme within that date, the proceedings will continue with reasonable speed and the owners of lands will have the satisfaction of their lands being acquired and prices given to them corresponding to a date not unreasonably remote from the actual acquisition; but if the delay is committed by the Municipal Council and if the Government extends the time, for the same reason for which the first notification mentioning a date for the submission of the scheme by the Municipal Council should be published there must be a notification containing the second date and this notification should be equally published. What the Act contemplates under S. 35 (2) (a) is the date of a notification which prescribes a date within which the Municipal Council should act and has acted. The date of Ex. A does not satisfy this condition. The Act does not expressly speak of any power in the Local Government to extend.

As the sections are worded the Act contemplates that the council has to take action within the time mentioned by the Government but as I said an extension can always be granted by a further notification. If so, the date of the further notification will be the date to be adopted under S. 35 (2) (a). Now, the final notification of the Government of September 1923 (Ex. D) certainly shows that the Government was willing to condone the delay of the Salem Municipal Council and accept the scheme submitted by the Council and by some straining of language it may be regarded as a notification under S. 12, though in such a view, we have got a merger of the notification under S. 12 and the notification under S. 14 (4); but I do not see anything illegal in it, though this was not what was contemplated by the Act. In this view I am willing to say that the proceedings validly continued under the

Town Planning Act and the date to be utilized under S. 35 (2) (a) is 14th September 1923, and we need not fall back upon the date fixed by the Land Acquisition Act. I might add that if this view of mine is not permissible, the only alternative view in my opinion seems to be that adopted by the District Judge.

But it seems to me that the whole discussion is academic. In my opinion there is plenty of documentary evidence in the case showing that on 1st February 1921 the rate of As. 2-3 a sq. ft. should be adopted as the value of the lands. Now, for the purpose of estimating the value of the lands we have got a number of sale deeds beginning from 1916 and running up to even 1928; but the later sale deeds after 1924 should be absolutely ignored. For our purpose it is unnecessary to go to sale deeds prior to October 1919. The following table shows the sales which are available from and after October 1919.

Date	Rate	Exhibit
1-10-1919	Re. 0-2-0 a sq. ft.	IV
2-10-1919	0-1-6 "	IV
3-11-1919	0-1-7 "	Z
4- 1-1920	0-1-10 "	Z-1
5- 4-1920	0-1-4 "	W
6- 5-1920	0-0-6 "	IV
7- 5-1920	0-1-7 "	IV

Of these sale deeds the last but one which works out at 6 pies per sq. ft. stands in a peculiar position. It differs so much from the others that there must be some reason for it—probably some peculiarity connected with the land sold under it. The only evidence we have got of the transaction is Ex. 4 filed by the Government which is a list of sales prepared by reference to the Registrar's office. The best evidence, namely the original sale deed is not produced, so that it seems to me that we must ignore this transaction. Ignoring it and taking the average of all the others we get an average of As. 1-8 per sq. ft. up to May 1920 and as there is an upward tendency from May 1920 on account of the fact that the lands were going to be acquired it is reasonable to assume that by February there would have been a further rise in value. Now, we have got on 24th May 1921 Ex. Q-1 showing a price of As. 2-8. With reference to Ex. Q-1 we may fix the price, February 1921 as As. 2-5. In January and June 1922 we

have got Ex. Q-3 and Z-2 showing a price of As. 3-2 and As. 2-6. In November 1922 we have got Ex. G and Z-3 showing only As. 1-8 and As. 0-1-10. But in March 1923 Ex. N shows a rate of As. 3-0. It seems to be that there must be some peculiarity in connexion with the plots covered by Exs. G and Z-3. The average of these six beginning from May 1922 and going up to March 1923 comes to As. 2-6. The rate of As. 2-3 adopted by the District Judge seems to be a proper rate. From this point of view the earlier discussion as to what date should be adopted becomes unnecessary. The general rate of As. 2-3 awarded by the District Judge is therefore confirmed.

In some of the appeals a question was raised as to the damages for severance awarded by the District Judge. It was objected that this claim was not made before the Collector and in some cases the claimant did not even appear before the Collector. But S. 25, Land Acquisition Act, gives the Judge discretion to raise such a question before him if sufficient reason is shown. In the present case the District Judge has allowed the claim for severance in many of the cases and no objection is taken on this ground in the grounds of appeal. I therefore think that this objection ought to be disallowed.

Another objection taken by the learned Government Pleader is that the area taken for roads is not properly dealt with by the District Judge. At the time of the acquisition in 1926 a plan was prepared which shows that a portion is left between the sites intended for houses and roads. But this was only in 1926. There is nothing to show when this separation of the plot for road was made and whether this separation was made in 1921 or 1923. The oral evidence shows that whenever it was made it was merely intended for the convenience of the neighbouring house-owners and they were given rights of way over it and there was no dedication to the public as a general pathway. For instance, P. W. 4 says:

"The road was opened by us. It was not open to the public. The site of the road belongs to us. We have been paying the taxes to the Municipality."

In his case there is an old sale deed, Ex. K, which shows that some pathway

was left as a road, but the extent is not mentioned. The District Judge, with reference to the evidence, has taken the extent to be 15 feet. We think he is right. One of the roads in Salem Town parallel to this road was only of the width of 12 feet. No doubt, under the Town Planning Act, the Municipality wanted roads of greater width even up to 36 feet, but there is no reason to attribute an intention to the parties to leave a road of that width. It may be that the intervening space was partly intended for a road and partly intended as sites for shops and so on as P. W. 4 says. Anyhow it is for the Government to show what the site actually marked out for the road in 1921 or 1923 was and we have no evidence in each case to show what it was. We cannot say that the width taken by the District Judge, namely, 15 feet, is unreasonable. P. W. 4 is the claimant in Appeal No. 219. Similarly in Appeal No. 218 there is a sale deed Ex. N showing an intention to leave out a road, but this was only in 1923. There is nothing to show that any road was marked out in 1921, so that Ex. N does not help the appellant. In the case of the other claimants we have not got any sale deeds.

In Appeal No. 228 it is complained that while Rs. 140 was given for the construction of a culvert, another Rs. 100 was given as damages for severance. The plan shows that the land of the claimant was cut open into a large plot plus two small triangular bits and it is very difficult to find the use for these triangular bits. Though it is possible to build small structures on them, undoubtedly this land has suffered from the severance and we do not think that the District Judge has exercised his discretion improperly in giving the damages of Rs. 100 for severance. This disposes of all the appeals in which special points were raised except Appeals Nos. 226 and 443, which are cross-appeals in the same case, namely L. A. C. No. 37. It will be convenient to take up those two appeals separately. The other appeals are dismissed with costs.

In these two appeals, Nos. 226 and 443, the facts are these: One of the suggested roads according to the Town Planning Scheme cuts off a corner of the house of Mr. R. Srinivasa Rao, an advocate. The frontage of the house is on

the western side and the road cuts off a slice in the backyard on the eastern side. When the proposal originally became known the claimant pointed out the inconvenience caused to the house and it was then thought that the Municipal Council should address the Government for a diversion of the proposed road. It may be mentioned here that an extension was made to the main building in about May 1925, by the addition of a kitchen. The proposed road does not encroach on the kitchen but runs by the side of it. When the Municipal Council recommended a diversion of the road to the Local Government, the owner of another plot objected to the diversions as it caused him considerable inconvenience. The Government passed orders to the effect that unless the Municipal Council enters into an agreement with all the persons affected by the diversion the Government cannot approve of the diversion proposed. This was on 8th December 1926. The claimant apparently anticipating that the Government will not sanction the diversion, filed his statement on 29th September 1926 before the land Acquisition Officer in which he prayed that his whole house might be acquired under S. 49. Land Acquisition Act. The land Acquisition Officer deals with this matter in para. 24 of his award. He says:

"In response to the notice under Ss. 9 and 10 of the Act, vakil R. Srinivasa Rao states that he has moved the Municipal Council about diverting the road at this spot and that the question of acquisition may be deferred till the Municipality decides the matter."

It does not appear when this statement was made. This land Acquisition Officer then says that the Council have since approved of the deviation. But the statement of the claimant and the approval of the Council must have been prior to the date of the award, namely 2nd, September. The land Acquisition Officer then observes:

"As however it involves a variation, of the scheme sanctioned by Government the deviation cannot be acted upon without Government sanction."

Then he proceeds to dispose of the matter. The award of the land Acquisition Officer does not clearly show whether he passed any order deferring the question of this particular acquisition till the Municipality decided the matter as was requested by the claimant. The next sentence of the officer suggests that he did defer his own inquiry until the

Municipality decided the question. If so it is not clear whether he gave a further notice to the claimant saying that there was no use of a fresh adjournment as the deviation cannot be acted upon without Government sanction. The sanction of the Government has been applied for by the Municipal Council on 21st November long after the award: Ex. 3. So at the time of the award there was no application made by the Municipal Council to the Government. But it seems to me that the land Acquisition Officer ought at least to have informed the claimant that further adjournment of the matter would be useless and he would proceed with it. It does not appear that he has given any such notice. It cannot therefore be said that the request of the claimant in his statement of 29th September was made too late. On the request of the claimant the matter was simply forwarded by the land Acquisition Officer to the District Judge. The learned District Judge held that this was not a case in which the whole house should be acquired and he gave Rs. 500 as damages for severance besides the price of the land.

The first question that arises in this case is whether an appeal lies. Two sets of cases have been cited by the advocates on both sides. One set of cases cited by Mr. B. Sitarama Rao, advocate for the claimant, shows that appeals under S. 49 have been entertained and considered by the High Court without any objection. The cases cited by the Government Pleader show that some Courts have held that no appeal lies. All these cases were decided before (1) the amendment of Ss. 26 and 54, Land Acquisition Act, by Act 10 of 1921 and (2) the decision of the Privy Council in *Ramachandra Rao v. Ramachandra Rao* (1), dated 31st January 1922. Prior to the said amendment and the said decision, the view generally prevailing was that awards under the Land Acquisition Act were not decrees, for it was so decided by the Privy Council in *Rangoon Botatoung Co. Ltd. v. The Collector of Rangoon* (2) and secondly, apart from an award, there could be no decree under the Act so as to make the matter res judicata between the parties. Now the amendment

(1) A. I. R. 1922 P. C. 80=67 I. C. 403=49 I. A. 129=45 Mad. 320 (P. C.).

(2) [1913] 40 Cal. 21=39 I. A. 197=16 I. C. 188 (P. C.).

and the decision of the Privy Council in *Ramachandra Rao v. Ramachandra Rao* (1), have effected a change in both these matters. In *Ramachandra Rao v. Ramachandra Rao* (1), the Privy Council held that if any question other than the amount of compensation was decided under the Land Acquisition Act by the civil Court after reference the order of the civil Court amounts to a decree and an appeal lies and the decision would be res judicata. In that case reference to the civil Court was made under S. 31 (2); but there is nothing in the judgment of their Lordships which shows that the decision turned upon anything peculiar to S. 31. S. 31 (2) refers to the Court to which a reference under S. 18 would be submitted. In S. 49 of the Act the language used is :

"the Collector shall refer the determination of such question to the Court. In deciding on such a reference the Court shall have regard to the question."

This shows that the conclusion of the Court on a reference under S. 49 is regarded as a decision and if the conclusion on a reference under S. 31 is a decree there is no reason why a decision under S. 49 should not be regarded as a decree. In the present condition of the Act all awards are decrees and all decisions of the civil Court other than awards on a reference under S. 31 (2) are also decrees. I do not see any reason why decisions on reference under S. 49 should not also be decrees. The earlier decisions therefore are of no value now. The whole scheme of the Act from the point of view of the question whether decisions of Court are decrees and whether appeals lie therefrom has entirely changed. The preliminary objection is therefore overruled and I hold that both the appeals lie.

The next question is whether the claimant has precluded himself from insisting on the whole house being acquired by any delay in making his claim. I have already set forth the circumstances under which he made his claim on 29th September, that is, after the award, and I think there is nothing in his conduct amounting to laches or estoppel. But apart from this there is nothing in S. 49 requiring the claimant to put forward this particular claim, namely, that the whole house should be acquired at any particular stage of the proceedings. The learned Government

Pleader argued that this sub.Cl. (2), S. 49 (1) shows that it should be made before the Collector made his award. But I do not think it shows anything of the kind. It only shows that in a case where it was made before the award the owner may withdraw or modify his desire. I cannot imply from this clause that such claims should be made before the Collector made his award. I do not think that legislation by implication of this kind is justified and apart from this clause there is no other clause which could be relied on to show that the owner should make this kind of claim before the award is made.

The third question that arises in the case is with reference to the merits. The question is whether the land proposed to be taken is reasonably required for the full and unimpaired use of the house under the last clause of S. 49 (1). Mr. Sitaram Rao, the learned advocate for the claimant referred to a number of English decisions and also the decision in *Khairati Lal v. Secy. of State* (3). The English Act and the Indian Act (10 of 1870), on which these decisions were based did not contain the clause similar to that in S. 49 (1). As was pointed out in the decision in *Venkataratnam Naidu v. The Collector of Godavari* (4), at p. 354 the clause was inserted to meet these decisions. I do not therefore think that these decisions are of any value to us. In the present case a small slice of the backyard is taken away for the road. It cuts off a small fuel shed which is a thatched structure. It also cuts off a portion of a latrine at the north-east corner of the compound. It is true that a latrine is necessary for the enjoyment of a house. If there is no other place within the compound where a latrine can be built for the use of this house, I think the owner can reasonably insist on the whole house being acquired. I do not think it is proper to point out to him that he should build a latrine beyond the compound by purchasing some other site outside the present compound. But it seems to me that the District Judge is right in holding that there is ample space within the backyard in which a latrine of the former size, namely 8 ft. 9 inches by 10 ft. 3 inches, can be built without any particular inconvenience to

(3) [1889] 11 All. 378.

(4) [1904] 27 Mad. 350.

the use of the house. Similarly a fuel shed can be put up. It cannot be successfully argued that a latrine and a fuel shed can be put up only at the places at which they stood at the time of the acquisition. Only then, can it be successfully argued that the land acquired is reasonably necessary for the enjoyment of the house. I therefore agree with the view of the District Judge that this is not a case in which the claimant can insist on the acquisition of the whole house. The result is that Appeal No. 443 should be dismissed with costs.

The District Judge thinks that the amenities of the house have somewhat suffered by taking away a substantial portion of the backyard and for this he gives damages for severance Rs. 500. We do not see any reason why we should differ from the view of the District Judge. I think therefore that Appeal No. 226 should also be dismissed with costs.

Memorandum of objection in A. S. No. 227 is not pressed and is dismissed with costs.

Cornish, J.—In Appeals Nos. 217 to 229 I entirely agree with the judgment just delivered, except upon one point, namely, the date for ascertaining market value for the purposes of compensation.

In my opinion 1st February 1921, the date of publication in the Fort St. George Gazette of the Government's notification under S. 12, is the date at which the market value is to be determined. In the lower Court it appears to have been thought that because the Government was empowered by S. 12 to fix a date for the preparation and submission of a draft scheme by the Municipal Council, the date when once fixed was unchangeable. But the date is not fixed by the Act. S. 12 says that the Local Government may require the Municipal Council "before a fixed date" to prepare and submit a scheme. This clearly means that the Government is to fix a date, and a power to fix a date carries with it a power to extend the date originally fixed unless there is anything in the Act to the contrary. On the other hand, when a Municipal Council proceeds under Ss. 9 and 10 to initiate a scheme, S. 11 fixes the time within which the draft scheme is to be prepared and published, and the power of the Local Government

to extend this period is expressly limited by S. 11. But the provision made by S. 12 is "notwithstanding anything contained in Ss. 8 to 11," and this means that the power of the Government to fix a date under S. 12 is free from the limitation imposed by S. 11.

The question is: Does the fact of the Local Government altering the date originally fixed for submitting a scheme under S. 12 affect the date of the notification for the purpose of S. 35 (2)? It seems to me that the fixing of a date for the submission of a scheme is subsidiary to the main objection of the publication of the notification, which is to give public intimation of the Government's resolve that a town planning scheme shall be made by the Municipal Council. This also appears to be the main object of the notification under S. 10 (1) when a Municipal Council has in the exercise of its powers under S. 9 resolved to make a town planning scheme. That is the reason, I think, why S. 35 (2) provides that in determining the amount of compensation to be awarded for land required under the Act the Collector and the Court shall take into consideration: (a) the market value of the land at the date of publication of the notification under S. 10 (1) or S. 12, as the case may be. It could not, in my opinion, be successfully contended that, if after publication of a notification under S. 10 (1) the Municipal Council obtained an extension of time from the Local Government under S. 11 (1) for the preparation and publication of the draft scheme, the date for determining the market value under S. 35 (2) would be correspondingly shifted, (and more than one extension might be granted), for that would be to make the date for determining the market value not the date of publication of the notification under S. 10 (1), but the date when time was finally extended under S. 11 (1). And I see no reason why an extension of the time originally fixed by Government under S. 12 should have any different result. In neither case does the Act require the publication of a fresh notification when an extension of time is given, and in the absence of such statutory requirement it appears to me that there is no foundation for the argument that the extended date for the submission of the draft scheme must be treated as the date of publication of the

notification for the purpose of S. 35 (2), Cl. (a).

But, as my Lord has pointed out, the question is not of practical importance in this case. The evidence of sales of plots between November 1919 to May 1920 and May 1921—excluding the 6 pies plot which was obviously exceptional and should not be taken into account in striking an average—shows that a rate of a little over 2 annas per sq. ft. would be a fair market value for February 1921.

Appeal No. 443.—With regard to A. S. No. 443, I agree that this appeal should be dismissed, not on the two preliminary objections taken by the learned Government Pleader, but on the ground that the District Judge has rightly held that the appellant is not entitled to compel the Municipal Council to acquire the whole of his premises. S. 49, Land Acquisition Act, cannot, in my opinion, be construed as requiring that an owner must, before the award has been made, express his desire to have the whole of the house or building acquired, though that would be the normal procedure. No doubt the section provides that the owner may withdraw or modify his expressed desire before the award is made. But that does not imply that an owner who has not made his claim prior to the award can in no circumstances make it afterwards. It has been suggested that the Acquisition Officer's notice under S. 9, Land Acquisition Act, furnished the proper opportunity to the appellant to make a claim under S. 49. But the particulars required to be put forward under S. 9 are quite different from a claim under S. 49. It is not necessary to decide whether, when a draft scheme is published under S. 14 (1), Town Planning Act, the objections and suggestions relating to the scheme which have to be made within the period of 60 days would include a claim of an owner under S. 49 to have the whole of his premises acquired when the scheme proposes to take only a part; or whether if an owner neglected to put forward this claim within the prescribed period for making objections and suggestions he would be precluded from doing so thereafter.

The question does not arise because there was no publication of the draft scheme here. It is clear that the appellant is not otherwise estopped by anything he did or failed to do. At the time

when the award was made there was no occasion for him to put forward a claim under S. 49. The Municipal Council had agreed with him to divert a road, and if this deviation from the scheme had been carried out there would have been no necessity for the taking of any portion of his premises. Unfortunately the Government refused to concur in this arrangement and only signified their refusal after the award had been made. In this state of facts I do not think that the appellant was debarred from having the question whether the Municipal Council should take the whole of his premises referred to the Court. On the authority of *Venkatareddi v. Adinarayana Rao* (5), which in turn followed the Privy Council's ruling in *Ramachandra Rao v. Ramachandra Rao* (1), the decision of the Court upon this reference under S. 49 must be held to be a decree and therefore appealable. But I think that the appeal fails on the merits. The appellant can only insist on the whole of his house being acquired if the parts proposed to be taken "form part of the house." This is entirely a question of fact which the Court in deciding is required by S. 49 to

"have regard to the question whether the land proposed to be taken is reasonably required for the full and unimpaired use of the house."

Looking at the plan of the appellant's premises it appears to me that there are good reasons for the District Judge's holding that the portion taken under the scheme is not reasonably required for the full and unimpaired use of the appellant's house, and consequently the appellant cannot compel the Municipal Council to acquire the whole.

P.R.S./K.N.

Order accordingly.

(5) A. I. R. 1929 Mad. 351=119 I. C. 42=52 Mad. 142.

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ANANTAKRISHNA AYYAR, J.

Ayyasami Chetty—Petitioner.

v.

Official Receiver, Coimbatore—Respondent.

Civil Revn. Petn. No. 1923 of 1927, Decided on 13th July 1931, against decree of Dist. Judge, Coimbatore, D/- 8th August 1927.

Provincial Insolvency Act (1920), S. 5—Ex parte order annulling adjudication—Application made by Official Receiver under S. 5 read with O. 9, R. 13 and O. 47, R. 1, Civil P. C.

can be entertained—Civil P. C. (1908), O. 9, R. 13 and O. 47, R. 1.

In cases relating to insolvency tried by mufassil Courts the mufassil Courts have by virtue of S. 5, the same powers as they have under the Civil Procedure Code in the exercise of matters that come before them in their original civil jurisdiction. Creditors are sure to be seriously prejudiced in several cases if adjudication in insolvency be annulled and having regard to the limit of time prescribed by Ss. 53 and 54 their right would be seriously prejudiced in various cases if they are confined to enforcing them by filing fresh applications in insolvency to adjudicate the same man insolvent.

Where an ex parte order is made annulling the adjudication on the application of an alienee from an insolvent and where an application is filed under S. 5, Provincial Insolvency Act, and O. 9, R. 13 and O. 47, R. 1, Civil P. C., for setting aside the ex parte order it is competent to the Court to entertain the application: *A. I. R. 1927 Mad. 175, Appr.*; *A. I. R. 1923 Mad. 355*; *A. I. R. 1922 All 206*; *A. I. R. 1930 Mad. 389 (F. B.)*; *A. I. R. 1927 Mad. 897* and *A. I. R. 1926 Mad. 942, Dist.*; *A. I. R. 1928 Mad. 265, Ref.* [P 65 C 2]

V. C. Veeraraghavachariar — for Petitioner.

Watrapp S. Subramania Ayyar — for Respondent.

Judgment.— This is an application filed under S. 75, Provincial Insolvency Act 5 of 1920, and also under S. 107, Government of India Act, asking the High Court to revise the order passed by the District Judge of Coimbatore in C. M. A. No. 51 of 1927. One Vedam Chetty was declared insolvent in I. P. No. 6 of 1923, on the file of the Subordinate Judge's Court of Coimbatore. Time for applying for discharge was extended from time to time and it was finally extended to 9th January 1927. The petitioner before me who is the father of the insolvent and who also was an alienee from the insolvent, applied on 21st December 1926 to have the adjudication of the insolvent annulled under S. 43, Provincial Insolvency Act. Notice of this application (I. A. No. 121 of 1927) was served upon the Official Receiver. On 14th March 1927, the Official Receiver applied to the Court to have the time for discharge extended till 9th January 1928. Evidently expecting that the Court would not pass final orders on 17th March 1927, the date to which the alienee's application was posted for hearing, the Official Receiver did not appear before the Court on 17th March 1927. Under the idea that the application was not contested by any creditor nor by the Official Receiver, the Court passed orders annulling the adjudication

on 17th March 1927. Immediately after the Court was made aware of the fact that the Official Receiver had already applied to have the time extended and that he was really contesting the application by the insolvent's father. The Official Receiver, on becoming aware of the orders passed on 17th March, immediately applied (on 23rd March 1927) under S. 5, Provincial Insolvency Act, read with O. 9, R. 13 and O. 47, R. 1, Civil P. C., for setting aside the ex parte order passed on 17th March. The learned Subordinate Judge came to the conclusion that he had jurisdiction to entertain the application of the Official Receiver and that on the merits the case before him was one in which orders should be passed in favour of the Official Receiver. The result was that the order of 17th March 1927 was set aside and I. A. No. 121 of 1927 was restored to file. Against the order an appeal was preferred by the alienee, the father of the insolvent, to the District Court of Coimbatore. The District Judge confirmed that order and dismissed the appeal. The present revision petition has been filed by Ayyasami Chetty, the father of the insolvent and alienee of his property, to this Court.

On behalf of the petitioner the learned advocate who appeared for him raised before me two points: (1) that the lower Court had no jurisdiction to entertain an application for review of the order passed on 17th March 1927, and (2) that in any case on the merits the receiver had made out no case for orders being passed in his favour.

On the question of jurisdiction of the Court to entertain such an application the learned advocate referred me to a decision of a Bench of this Court reported in *Venugopalachariar v. Chinnulal Sowcar* (1). There the learned Judges had to consider whether, having regard to the provisions of S. 5, Provincial Insolvency Act, read with S. 10 (2) of the same Act, an insolvent whose application had been dismissed for his absence was entitled to apply for review or to apply under O. 11, Civil P. C. The learned Judges held that S. 5 has to be read along with S. 10 (2), and as the insolvent had a right to apply afresh he was not entitled to make the application. An earlier decision of another Bench of this Court in the case

(1) *A. I. R. 1926 Mad. 942=97 I. C. 706=49 Mad. 935.*

reported as *Abbireddi v. Venkatarreddi* (2) was brought to their notice, but, as I understand the judgment in the case reported at p. 209, the learned Judges, though not agreeing with the reasoning of the decision in the case reported at p. 60, proceeded to dispose of the case before them on the ground that the petitioner in that case being the insolvent had other remedies open to him and that being so the remedy sought by him in that case was not available to him under O. 9, Civil P. C. Naturally the learned advocate for the petitioner laid great emphasis on this decision, and invited me to hold that under the Insolvency Act there is no power of review open either to the Official Receiver or to the creditors, or any right to apply under O. 9, Civil P. C. I am unable to agree with this extreme contention. S. 5, Provincial Insolvency Act, enacts that

"subject to the provisions of this Act the Court in regard to proceedings under this Act, shall have the same powers and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction."

In my view, in cases relating to insolvency tried by mufassil Courts, the mufassil Courts have by virtue of this S. 5 the same powers as they have got under the Civil Procedure Code, governing their powers and procedure in the exercise of original matters that come before them in their civil jurisdiction; I am not satisfied that there is anything in the provisions of the Act to which my attention has been drawn which takes away the right of review, or the right to apply under O. 9, (subject to any other provisions of the Act) so far as the case before me is concerned. Creditors are sure to be seriously prejudiced in several cases if adjudications in insolvency be annulled, and having regard to the limit of time prescribed by Ss. 53 and 54 of the Act, their right would be seriously prejudiced in various cases if they be confined to enforcing them by filing fresh applications in insolvency to adjudicate the same man as insolvent. The case before the learned Judges in *Venugopalachariar v. Chinnullal Sowcar* (1) was a case of the insolvent himself applying to the Court for fresh orders. The case before me is not the case of an insolvent but the case of an Official Receiver who represents the creditors of the insolvent. There is probably substantial difference between the

(2) A. I. R. 1927 Mad. 175=91 I. C. 351.

two classes of persons who seek the assistance of the Court. In any event my attention was drawn to a case which seems to be more directly in point, namely, that reported in *Abbireddi v. Venkatarreddi* (2), which was a case where a similar application was made by a creditor of the insolvent. The learned Judges there held that such an application at the instance of a creditor did lie and that their rights were not confined to filing a fresh application for adjudication. With respect I agree with that decision. No doubt the learned advocate for the petitioner drew my attention to one sentence appearing at p. 61 of the report where the learned Judges say: "the power of review is inherent in the civil Court."

He emphasized the position that rights of appeal and rights of review should be expressly conferred on Courts by statutes, and that there is no such thing as inherent right of review possessed by civil Courts. But having regard to the context of the judgment, I understand the reasoning of the learned Judges to be the following: Mufassil Courts, which are governed by the provisions of the Civil Procedure Code, possess the power of review expressly conferred upon them by the Code, and reading those provisions along with S. 5, Provincial Insolvency Act, the power of review is inherent in the mufassil Courts exercising powers of insolvency under the Provincial Insolvency Act. It therefore seems to me that the plea of want of jurisdiction raised by the learned advocate for the petitioner is against the decision in *Abbireddi v. Venkatarreddi* (2). The learned Judges there further point out that Spencer, J., in an earlier case reported in *The Official Receiver, Tanjore v. Nataraja Sastrigal* (3) and the Allahabad High Court in the case reported in *Munnulal v. Kunj Bihari Lal* (4) have held the same view. Before I conclude this portion of my judgment I think it is proper to draw attention to the recent Full Bench decision reported in *Palani Goundan v. Official Receiver, Coimbatore* (5), which is relevant for this purpose, namely, that the presence of the

(3) A. I. R. 1923 Mad. 355=72 I. C. 225=46 Mad. 405.

(4) A. I. R. 1922 All. 206=67 I. C. 317=44 All. 605.

(5) A. I. R. 1930 Mad. 389=124 I. C. 61=53 Mad. 288 (F.B.).

word "shall" in S. 43, which was taken to create much difficulty and which was understood as a mandatory provision by law, has been explained by the Full Bench in the case in *Palani Goundan v. The Official Receiver, Coimbatore* (5), and of course the learned Judges who decided the case in *Venugopalachariar v. Chinnulal Sowcar* (1), decided it before they had the benefit of the Full Bench decision. A decision of another Bench of this Court, *Ramesam and Madhavan Nair, JJ., in Govinda Rao v. Official Receiver, Trichinopoly, A. I. R. 1927 Mad. 897*, has also been brought to my notice and it would also seem to support the contention that the Court has jurisdiction in such cases. The decision in *Tirumala Reddi v. Thomasu Reddi*, (6) was also referred to, and though the learned Judges Kumaraswami Sastriar and Wallace JJ., referred to the decision in *Abbireddi v. Venkatareddi* (2), and apparently agreed to the view relating to the right of review in such cases, it cannot be said to be a decision on the point that has arisen before me. The learned advocate for the petitioner also drew my attention to the fact that the Presidency Towns Insolvency Act, S. 8 (1) specifically confers on such Courts in the Presidency towns the power of review. As far as I am able to understand the position, that argument is not against the view I am inclined to adopt. The Civil Procedure Code, as such, does not apply to the proceedings before the original side of the High Court, whereas the Civil Procedure Code as such is made applicable under S. 5, Provincial Insolvency Act, to proceedings before the mufassil Courts. That probably is the reason why we have not got any such specific provision in the Provincial Insolvency Act, corresponding to S. 8 (1) that occurs in the Presidency Towns Insolvency Act.

For the above reasons I am not able to uphold the contention raised by the learned advocate for the petitioner that it was incompetent to the lower Court to entertain the application presented by the Official Receiver. I accordingly overrule his first contention.

On the merits, I do not think that I need say much. The two lower Courts have considered the question on the merits and have come to the conclusion

that the Official Receiver had made out "sufficient cause." In fact the Official Receiver said that he committed a bona fide mistake, and it is clear that the general body of creditors should not be made to suffer owing to a bona fide mistake committed by the Official Receiver. I am not inclined to interfere with the finding of both the lower Courts on this point, namely, that the Official Receiver has made out a sufficient case on the merits.

I accordingly overrule both the contentions raised by the learned advocate for the petitioner and dismiss the revision petition, but I think that the present is a case where I should not give costs to the respondent here of the revision petition.

P.R.S./P.N.

Revision dismissed.

*** A. I. R. 1932 Madras 66**

MADHAVAN NAIR AND JACKSON, JJ.

Palanivelu Odayar—Appellant.

v.

Official Receiver, West Tanjore—Respondent.

Appeal No. 301 of 1929, Decided on 2nd September 1931, against order of Dist. Judge, West Tanjore, at Tanjore, D/- 17th July 1929.

*Provincial Insolvency Act (1920), Ss. 4 and 5—Under S. 4 Insolvency Court has wide powers even to pass orders against strangers to insolvency proceedings—In difficult questions of title Official Receiver should be asked to institute proceedings in civil Court—Stranger ordered to pay mesne profits to Official Receiver where suit-property is hypothecated by insolvent to the stranger five months before adjudication—Order should be executed as in civil suits.

Very wide powers are given to the insolvency Court under S. 4 of the Act. It may decide any question which it may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property, and in doing so it has ample power to decide questions of title arising between the estate of an insolvent and a third party. This jurisdiction is no doubt of a discretionary character, and in cases which involve determination of difficult questions of title the Insolvency Court will be well advised in asking the Official Assignee to institute proceedings in an ordinary civil Court. [P 69 C 1, 2]

The Insolvency Court has full jurisdiction to pass an order for the payment of mesne profits to the Official Receiver against a third party though a stranger to the insolvency proceedings, where the insolvent has hypothecated the suit property to the third party five months before his adjudication. S. 5 of the Act provides for effect being given to the orders and decrees passed by the Insolvency Court. The order directing the payment of mesne profits should

(6) A. I. R. 1928 Mad. 265 = 109 I. C. 581 = 51 Mad. 839.

be executed in the same way as orders passed by civil Courts: 40 *Mad.* 810; *A. I. R.* 1929 *Mad.* 705; *A. I. R.* 1922 *Mad.* 147; *A. I. R.* 1921 *Mad.* 204 and *A. I. R.* 1929 *Mad.* 705, *Rel. on.*; *A. I. R.* 1926 *Mad.* 363 and *A. I. R.* 1928 *Mad.* 732, *Dist.* [P 70 C 1]

T. M. Krishnaswamy Aiyar and *T. S. Vaidyanatha Ayyar*—for Appellant.

A. V. Viswanatha Sastri—for Respondent.

Judgment.—One Singaram Chettiar was adjudged insolvent by the District Judge of West Tanjore on 26th October 1923 by the order on I. P. No. 24 of 1923. On 30th May 1923 he had executed a usufructuary mortgage for Rupees 25,000 in favour of one Appadurai Udayar and has also transferred to him for Rs. 36,000 his rights under a hypothecation bond for Rs. 20,000. After the estate of the insolvent became vested in the Official Receiver, he filed O. P. No. 15 of 1924 for the annulment of the two alienations in favour of Appadurai Udayar under S. 53, Provincial Insolvency Act. These alienations were annulled on 18th October 1924. Subsequently, the Official Receiver filed I. A. No. 556 of 1926 in which he asked the Insolvency Court to pass an order for the payment by Appadurai Udayar of Rs. 4,000 as the profits for the two years from 30th May 1923 to June 1925. On 29th January 1927 an ex parte order was passed against him in which he was directed to pay the Official Receiver Rs. 4,000 as mesne profits for the two years 1924 and 1925 during which time he was illegally in possession of the property. After this order Appadurai Udayar died and his grandson was brought on record as his legal representative. In the petition out of which this appeal arises the Official Receiver sought to execute the order for mesne profits against legal representative, the appellant before us.

Various objections against the execution of the order were pressed in the lower Court but all were overruled by the learned District Judge. Of these the only objection pressed before us is that the Insolvency Court has no jurisdiction to pass the order directing the payment of mesne profits, inasmuch as Appadurai Udayar, against whom the order was passed, was a stranger to the insolvency proceedings. It is obvious that the Insolvency Court has no jurisdiction to pass the order in question under S. 53, Provincial Insolvency Act.

That being so it is argued that the Insolvency Court has no jurisdiction to pass an order on what is called "a garnishee summons" directing a third party a stranger to the Insolvency proceedings, to make a payment in favour of the Official Receiver. In reply it is contended by the Official Receiver that S. 4, Provincial Insolvency Act, gives ample power to the Insolvency Court to pass an order like the one in question.

Section 4, Cl. 1, Act 5 of 1920, is as follows:

"Subject to the provisions of this Act, the Court shall have full power to decide all questions whether of title or priority or of any nature whatsoever, and whether involving matters of law or of fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case."

This provision did not exist in the previous Provincial Insolvency Act of 1907. It is framed on the lines of S. 7, Presidency Towns Insolvency Act (Act 3 of 1909), which is as follows:

"Subject to the provisions of this Act, the Court shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or of fact, which may arise in any case of insolvency coming within the cognizance of the Court or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case."

This section was later on amended in 1927 by the addition of a proviso to it. It is obvious that S. 4, Provincial Insolvency Act, is almost identical in terms with S. 7, Presidency Towns Insolvency Act. Under both the sections the Insolvency Courts have wide powers not only to decide all questions of priority but all other questions which the Courts may deem it expedient or necessary to decide for the purpose of doing complete justice or of making a complete distribution of property. The question is whether under the wide powers given under S. 4, Provincial Insolvency Act, the Insolvency Court has jurisdiction to adjudicate upon the claims of third parties or whether in such cases, the Official Receiver should be directed to institute suits in ordinary civil Courts. As the terms of S. 4, Provincial Insolvency Act, are similar to the terms of S. 7, Presidency Towns Insolvency Act, cases explaining the scope of the latter S. 7, may well be

relied on to interpret the nature of the jurisdiction of the Insolvency Courts under S. 4, Provincial Insolvency Act. The learned counsel for the respondent has relied on these cases in support of his contention. He has also relied on some cases which are express decisions under S. 4, Provincial Insolvency Act itself. A recent Full Bench decision of this Court, *Official Assignee, Madras v. Narasimha Mudaliar* (1), in which the scope of S. 7, Presidency Towns Insolvency Act, prior to its amendment in 1927, is explained, has also been brought to our notice. We will now proceed to examine these cases.

In *Abdul Khader v. The Official Assignee of Madras* (2), it was held that

"Under S. 7, Presidency Towns Insolvency Act (3 of 1909), the High Court of Madras in the exercise of its insolvency jurisdiction, has jurisdiction to adjudicate on claims relating to immovable property situate outside the limits of its ordinary original civil jurisdiction."

It was also pointed out that:

"the jurisdiction conferred by S. 7 of the Act is of a discretionary character, and it is seldom that the Insolvency Court will deem it expedient to try difficult questions of title; and the Judge in such cases would ordinarily ask the Official Assignee in Insolvency to establish his title in an ordinary civil Court."

In coming to this conclusion the learned Judges relied on various English cases which fully recognize the jurisdiction of the Court of Bankruptcy in England in deciding upon the rights of third parties. This decision was accepted as laying down the correct law in the decision in *In re Krishna Rao* (3).

The decision in *Official Receiver, Tinnevely v. Sankaralinga Mudaliar* (4), was one under Act 3 of 1907 but in the course of the judgment the learned Judges refer to S. 4, Act 5 of 1920. In that case where after the appointment of a Receiver for the estate of an insolvent had been made by a District Court, some of the properties of the insolvent were sold in auction by a District Munsif's Court in execution of a decree for money passed by the latter Court prior to the order of adjudication, it was held that it was competent to the receiver to make an application to the District Court for annulment of the sale and for

delivery of possession of the properties from the purchaser under S. 18, Cl. 3, Provincial Insolvency Act 3 of 1907 and the order of the District Judge, that the Official Receiver had no locus standi to impeach the same by means of a petition to the Insolvency Court, was set aside. With reference to the point under discussion the following observations of Oldfield, J., may be referred to with advantage:

"The general question thus raised is whether the Court dealing with an insolvency under the Provincial Insolvency Act has either an exclusive jurisdiction or concurrent with that of the ordinary Courts to deal, for the purpose of the administration of the insolvent's estate, with claims against persons holding it adversely to him, whether they have arisen from purchase at Court sale or otherwise. Before dealing with the provisions of the Act, I observe that such an exclusive jurisdiction is well recognized elsewhere in Insolvency systems, which are of longer standing than the Provincial Act, and which are usually referred to in its construction. Reference may be made on this point to the decisions collected under S. 105, *English Bankruptcy Act, 1914*, at p. 375, *Williams Bankruptcy Practice*, Edn. 11, and to S. 7, Presidency Towns Insolvency Act (3 of 1909), of which the material portion was reproduced from the English Act in force at its date; and it is significant that, although there is no reason for presuming any intention to change the law, the legislature has included a similar provision, as S. 4, Provincial Insolvency Act (5 of 1920), which is now in force."

Seshagiri Iyer, J., even went to the extent of saying that the wide powers given by S. 4 of the present Act had already existed in the Insolvency Court and that S. 4 only declares what has been the law throughout. For our present purpose it is not necessary to discuss this position.

In *Ramasami Chettiar v. Ramaswami Iyengar* (5), which was a case under the present Act, it was held that under Ss. 4, 5 and 56, Provincial Insolvency Act (5 of 1920) a Court of Insolvency can inquire into disputed title and order delivery of an insolvent's property to a purchaser thereof from the Official Receiver removing the obstruction of a third party. In the course of the judgment the learned Judges stated thus:

"We have therefore no hesitation in holding that the Insolvency Court has plenary powers to deal with the claims of third parties under the provisions of the present Provincial Insolvency Act."

The next decision requiring notice is the Full Bench decision in *Official*

(1) A. I. R. 1929 Mad. 705=118 I. C. 505=52 Mad 717 (F.B.).

(2) [1917] 40 Mad. 810=36 I. C. 524.

(3) A. I. R. 1928 Mad. 732=112 I. C. 149=51 Mad. 540 (F.B.).

(4) A. I. R. 1921 Mad. 204=62 I. C. 495=44 Mad. 524.

(5) A. I. R. 1922 Mad. 147=65 I. C. 394=45 Mad. 434.

Assignee, Madras v. Narasimha Mudaliar (1). In this case the Full Bench considered the nature of the jurisdiction vested in the Court under S. 7, Presidency Towns Insolvency Act, before the amendment and how far that jurisdiction was limited by the amendment to that section introduced in 1927. It was held that Section 7, Presidency Towns Insolvency Act, is not limited in its scope to matters in which the Official Assignee by the operation of the insolvency law claims higher title than what the insolvent himself would have had, and the Official Assignee is entitled to proceed by way of motion under S. 7 in cases where he has a money claim against strangers to the insolvency, the only limitation placed on the jurisdiction of the insolvency Court being, that when once the Official Assignee has summoned a witness under S. 36 of the Act and that witness disputes his indebtedness, the Official Assignee has no option but to proceed by way of suit.

It may be observed that S. 4, Provincial Insolvency Act, has no proviso like the one in S. 7, Presidency Towns Insolvency Act. In the judgment of Beasley, J., as he then was, it was made clear

"that S. 7 before its amendment was not limited in its scope to matters in which the Official Assignee by the operation of the Insolvency law claims a higher title than the insolvent would himself have had."

Having pointed out how in one direction the amendment of S. 7 has affected the powers of the Insolvency Court, the learned Judge made the following observations regarding the discretionary nature on the jurisdiction vested in the Court by that section and how that jurisdiction should be exercised:

"It is then for the Court to say whether the matter is one which is reasonable, having regard to the convenience of all concerned, to deal with on a motion or whether it should be dealt with in a regular suit. But in my opinion no money claim in which any difficult questions arise should be dealt with by way of motion, nor should large claims; only simple cases capable of easy and speedy proof should be so dealt with."

It will be observed that in *Abdul Khadar v. The Official Assignee of Madras* (2) also the discretionary character of the jurisdiction was pointed out by Rahim, J.

It will be seen from all these cases that very wide powers are given to the Court under S. 4, Provincial Insolvency Act. It may decide any question which it may deem it expedient or necessary

to decide for the purpose of doing complete justice or making a complete distribution of property; and in doing so it has ample power to decide questions of title arising between the estate of an insolvent and a third party. This jurisdiction is no doubt of a discretionary character and in cases which involve determination of difficult questions of title the Insolvency Court will be well advised in asking the Official Assignee to institute proceedings in an ordinary civil Court.

As against the above decisions the appellant has mainly relied upon two decisions of this Court, namely, *Chittammal v. Ponnuswamy Naicker* (6) and *In re Krishna Rao* (3). Neither of these decisions in our opinion helps him. In *Chittammal v. Ponnuswamy Naicker* (6) the learned Judges held that an application will not lie under S. 56, Provincial Insolvency Act, because the person in possession disputed the insolvent's title and they pointed out that

"it is open to the Court, on a proper application being made under S. 4 of the Act, to try the issue whether the insolvent is entitled to the property or not."

The decision in *In re Krishna Rao* (3) might at first sight seem to support the appellant, but the reasoning in the judgment makes it clear that the decision really does not help him. In that case, on the insolvency of a Hindu father the Official Receiver sold the family property including the sons' share. The question was whether the purchaser from the Official Receiver of the sons' share can obtain delivery of possession of the shares of the sons under S. 4, Provincial Insolvency Act. It was held that in so far as the sons' share was concerned the remedy of the purchaser would be to institute a regular suit for possession in the ordinary civil Court. The reasoning on which this conclusion was based is this:

"Once the Official Receiver has sold the property to a stranger and converted the insolvent's estate into money, his business is to distribute this money among the creditors, and it cannot be said that delivery of possession is a necessary part in the work of distributing the assets of the insolvent among the creditors. Where a claim is made against the insolvent himself in respect of his share only or against a rival purchaser of the insolvent's property itself, the matter may be different."

It is clear from this reasoning that it was held that S. 4 did not apply because the question that arose in that case was

(6) A. I. R. 1926 Mad. 363=92 I. C. 573=49 Mad. 762.

not a question which related to the distribution of the property of the insolvent; on this ground the case is clearly distinguishable.

We have not been shown how the wide powers vested in the Court under S. 4, as pointed out in the decisions we have referred to, which would include also power to adjudicate on the claims of third parties, has been curtailed by any other provision contained in the Act. It follows therefore that the Insolvency Court has full jurisdiction to pass an order for the payment of mesne profits against the father of the appellant in this case. S. 5 of the Act provides for effect being given to the orders and decrees passed by the Insolvency Court. The order directing the payment of mesne profits can therefore be executed in the same way as orders passed by civil Courts.

For the above reasons we hold that the learned District Judge had jurisdiction to pass the order in question under S. 4, Provincial Insolvency Act, and that this civil miscellaneous appeal should be dismissed with costs.

In the view that the learned District Judge had jurisdiction to pass the order, it is not necessary to discuss whether the objection that the order was passed without jurisdiction can be taken in execution proceedings.

P.R.S./B.V.

Appeal dismissed.

A. I. R. 1932 Madras 70

WALSH, J.

(*Paliyankotan Kuruwan Parambath Veetil*) Chathu Kutti Nair—Plaintiff—Petitioner.

v.

Kundan Appa and others—Defendants—Respondents.

Civil Revn. Petn. No. 1117 of 1928, Decided on 9th September 1931, against order of Dist. Munsif, Cannanore, D/- 2nd March 1928, in Small Cause Suit No. 1304 of 1927.

Contract Act (1872), S. 202—Cancellation of power-of-attorney not complying with terms mentioned therein is illegal—Malabar law, Tarwad.

A person who is a member of the tarwad, and who is entitled to be maintained out of the tarwad property, has a clear interest in the rents before and after the grant to him of the power-of-attorney for collection of rents, the rents being part of the tarwad property. A cancellation of such power in favour of such person is illegal if the conditions for such cancellation, as mentioned in the power-of-attorney are not duly complied with. [P 71 C 1]

D. T. G. Nambiar—for Petitioner.

M. C. Sridharan—for Respondent.

Judgment.—The petitioner brought a suit to recover rents from defendants 1 to 3 who had attorned to him under a marupat. The plaintiff is the karnavan of the tarwad. Defendant 5 is a junior member to whom the plaintiff had given a power-of-attorney to collect the rents. The plaintiff says that he had revoked this power of attorney on 22nd September 1927 and that the payment of rent made by the defendants in December 1927 to defendant 5 was consequently invalid. Two pleas were raised in defence; that the defendants had mortgaged the property to D. W. 1 with instructions to pay the rent to defendant 5 and that D. W. 1 was not aware of the cancellation. The second is that the cancellation itself was illegal. I have not considered it necessary to call on the respondents to answer the first point because on the second I think the decision is correct. The petitioner contends that the cancellation is valid, that if it was made before the time fixed in the power-of-attorney for its termination the only remedy is one by way of damages under S. 205, Contract Act, and that defendant 5 had no interest in the property as described in S. 202. The question therefore is whether defendant 5 had any such interest in the property as is contemplated under S. 202. Defendant 5 is a member of the tarwad and entitled to be maintained out of the tarwad property. The rents are part of the tarwad property and he in my opinion has a clear interest in the rents before and after the grant to him of the power-of-attorney. Under S. 202 Pollock and Mulla state with regard to "authority coupled with interest" that in England the word "coupled" implies beyond the mere fact of the agent having an interest in the subject-matter, some specific connexion between the authority and the interest. They quote from *Smart v. Sanders* (1) at p. 917 as follows:

"We think this doctrine, i. e., the rule of the present section, applies only to cases where the authority is given for the purpose of being a security, or, as part of the security, not to cases where the authority is given independently, and the interest of the donee of the authority arises afterwards, and incidentally only, as for instance, in the present case, goods are consigned to a factor for sale. This confers an implied

(1) [1859] 5 O. B. 895=17 L. J. O. P. 258=12 Jur. 751.

authority to sell. Afterwards the factor makes advances. This is not an authority coupled with an interest; but an independent authority, and an interest subsequently arising."

It appears to me from this that in English law, if the interest was previous to the authority, it would be such an interest as is contemplated in S. 202. Under the heading "Indian authorities" at p. 675, the cases quoted are ones where the agent had no interest in the authority. I must hold in the present case that defendant 5 (agent) had an interest in the property, namely, the rents due to the tarwad, and that the cancellation of his authority was illegal, the conditions of such cancellation not having been complied with as pointed out by the lower Court.

The petition fails and must be dismissed with costs.

P.R.S./K.N.

Petition dismissed.

A. I. R. 1932 Madras 71

CURGENVEN AND CORNISH, JJ.

Gadde Sitayya and another—Appellants.
v.

Gadde Kotayya and others—Respondents.

Appeals Nos. 260, 436, 437 and 438 of 1925, Decided on 25th March 1931, against decrees of Sub-Judge., Kistna, in Original Suits Nos. 95 of 1922 and 20 of 1923.

(a) Specific Relief Act (1877), S. 27—Prior agreement to sell—Subsequent third party purchaser—Such purchaser has to prove his good faith, payment of consideration and want of notice.

Where there is a prior agreement to sell, in spite of which the property is actually sold to a third party purchaser and the prior promisee sues for specific performance of the agreement the burden of proving (a) that the subsequent purchaser paid valuable consideration, (b) that he acted bona fide, and (c) that he had no notice, lies on that purchaser, assuming, of course, that the plaintiff has established the prior agreement to sell, alleged in his plaint: 23 I. C. 621; 36 Bom. 446, *Foll.* 20 I. C. 195 and 25 *Mad.* 1, *Dist.* [P 72 C 2]

(b) Specific Relief Act (1877), S. 27—Tenant in possession of property—Purchaser need not inquire about lessor's title.

Where there is a tenant in possession of a property it cannot be said that it is incumbent upon an intending purchaser not only to ascertain what the tenant's rights are but also who is his lessor and what is that lessor's title: *Hunt v. Leuk*, (1902) 1 Ch. 428; 16 Cal. 414 and 27 Bom. 408, *Ref.* [P 72 C 2]

T. R. Venkatarama Sastri, B. Satyanarayana and, K. Bhimasankaran—for Appellants.

V. Suryanarayana—for Respondents.

Curgenvén, J.—These four appeals are from decrees passed by the Subordinate Judge of Kistna in four connected suits. There were three brothers, Kotayya, Nagayya and Gangayya, of whom Gangayya died in November 1918, while Kotayya and Nagayya survive. In 1910 they divided their property, each thus becoming possessed of 10.10 acres. It appears that thereafter Nagayya and Gangayya lived together, and they jointly entered into a mortgage of their property which formed the subject-matter of the decree against them in O. S. 378 of 1916 on the file of the Ellore District Munsif's Court. Gangayya died shortly afterwards and execution was taken in respect of the whole property against Nagayya. There was a Court sale which was successfully impeached, and when the property was brought to sale a second time it was privately purchased by one Sitayya for a sum of Rs. 6,500 and the Court sale was averted by a deposit under O. 21, R. 89, Civil P. C. In O. S. No. 95 of 1922, to which A. S. No. 260 relates, the purchaser Sitayya sued to recover possession of the property which he had thus purchased. The other brother Kotayya contested the claim as defendant 1, and Nagayya as defendant 6 set up various pleas including one of lack of consideration. The case of defendant 1 in that suit was that a half-share of Gangayya's property devolved upon him as heir, and that prior to the date of the sale deed he had agreed with Nagayya to purchase the other half-share and had paid a sum of Rs. 2,000 in pursuance of that agreement. Before turning to these contentions, the latter of which forms the main question before us, it may be added that O. S. 21 of 1923, corresponding to Appeal No. 437, is a suit by Kotayya against Nagayya and Sitayya for specific performance of his agreement and O. S. 20 of 1923, corresponding to Appeal No. 436, is a similar suit by a Mahomedan lady (defendant 8 in O. S. 95) in respect of an area of 2.25 acres out of Nagayya's own land. The fourth suit O. S. 95 of 1923 (Appeal No. 438) was by Sitayya for contribution against Kotayya in respect of the payment by him of debts owing by Gangayya.

Dealing now with Appeal No. 260, the purchaser Sitayya, who is the appellant, claims the whole of Gangayya's 10.10 acres, which are now admittedly in the

possession of Kotayya, upon the ground that by a reunion with Gangayya, Nagayya had become entitled to it, upon his brother's death, by survivorship. The learned Subordinate Judge has decided this question of reunion in the negative, and Mr. T. R. Venkatarama Sastri confesses himself unable seriously to challenge this finding. Accordingly the most that the purchaser can have acquired under his sale deed would be the half-share of Gangayya's property devolving upon Nagayya as heir. Kotayya however disputes his title even to this half-share upon the allegation, already referred to, of a subsistent agreement to sell. Some confusion has been created by the circumstance that in the grounds of appeal an area of 5.05 acres only of Gangayya's land has been included whereas the appeal grounds embrace both the half-share to which the alleged agreement relates and the other half-share which fell to Kotayya directly as heir. Inasmuch however as we are going to find on the merits that the appellant's claim must fail as regards the whole of Gangayya's property we think it best not to dispose of the appeal upon the ground of this oversight or to allow it to be remedied by the appropriate procedure.

The first point which accordingly arises for decision is whether the agreement alleged by defendant 1 Kotayya is true.

* * * * *

We think there is no doubt whatever that the agreement pleaded by Kotayya both as a defence to Sitayya's suit for possession and as a basis for his own suit for specific performance is true.

In order that this agreement may prevail against the subsequent transferee, the transferee must under S. 27, Specific Relief Act show that he is

"a transferee for value who has paid his money in good faith and without notice of the original contract."

There has been some discussion with regard to the onus of proving or disproving notice. There are cases under Ss. 48 and 50, Registration Act (providing for the priority of registered documents as against earlier oral agreements or unregistered documents) which, while holding that these provisions operate subject to no notice having been received, have laid down that the onus of proving notice is upon the party alleging it: see *Chin-*

nappa Reddi v. Manickavasagam Chetti (1) and *Magoo Brahma v. Bhoti Das* (2). These cases do not however proceed upon the terms of S. 27, Specific Relief Act. The case which directly applies those provisions, and which we propose to follow is *Thiruvenkatachariar v. Venkatachariar* (3). The learned Judges point out, in strict conformity with the terms of the statute, that the case of *Himatlal Motilal v. Vasudev Ganesh* (4), decides:

"that the burden of proving (a) that the subsequent purchaser paid valuable consideration (b) that he acted bona fide and (c) that he had no notice lies on that purchaser, assuming, of course, that the plaintiff has established the prior agreement to sell, alleged in his plaint."

In these proceedings therefore it is for Sitayya to show that he took his sale deed in ignorance of the earlier agreement. Even if however the burden were on the other party, we think that the finding of the learned Subordinate Judge upon this point must be supported, though perhaps not for the reasons which he assigns. We do not think that the authorities go so far as to lay down that where there is a tenant in possession of the property it is incumbent upon an intending purchaser not only to ascertain what the tenant's rights are, but also who is his lessor and what is that lessor's title: see *Hunt v. Leuck* (5), *Gunamoni Nath v. Busunt Kumari* (6) and *Kondiba v. Nana* (7). The mere circumstance therefore that there was in possession a tenant who, if questioned, would have named Kotayya as his lessor is not by itself sufficient to dispose of this point. Apart from that however there are abundant reasons for concluding that the fact of the agreement must have reached Sitayya's ears. Sitayya, on the plea of ill-health, did not appear as a witness. His son-in-law, P. W. 1, says that there is only a wall between Nagayya's house and theirs and their lands are half a furlong apart. At the time of the police inquiry into the dispute about possession Sitayya was Village Munsif, and it is extremely unlikely that he should not have heard all about it. The writer of his sale deed, P. W. 5, actually attested the statement

(1) [1902] 25 Mad. 1.

(2) A. I. R. 1914 Cal. 331=20 I. C. 195.

(3) A. I. R. 1914 Mad. 634=23 I. C. 621.

(4) [1912] 36 Bom. 446=16 I. C. 580.

(5) [1902] 1 Ch. 428=71 L. J. Ch. 239=86 L. T. 68=50 W. R. 291=18 T. L. R. 265.

(6) [1889] 16 Cal. 414.

(7) [1903] 27 Bom. 408=5 Bom. L. R. 269.

made by the tenant in those proceedings. A witness who took part in cultivating Gangayya's land, D. W. 4, and who deposes that Kotayya gave it out, speaks to Sitayya's knowledge of this arrangement. Altogether it is impossible to suppose that Sitayya was in ignorance of the disputes about this property and he must have known in taking the sale deed that his purchase was a highly speculative one. We agree in deciding this point against him and his Appeal No. 260 of 1925, accordingly fails and is dismissed with costs of respondent 1.

It follows that Appeal No. 437 of 1925, which is filed by Sitayya against the decree for specific performance granted to Kotayya in O. S. No. 21 of 1923, must also be dismissed with costs of respondent 1.

In Appeal No. 436, in which the appellant is again Sitayya, the same questions arise with regard to a prior agreement alleged to have been entered into by Nagayya in favour of the plaintiff, Dariya Bibi, and of Sitayya's notice of that agreement. In this instance the agreement, and indeed the two preceding agreements, which it superseded, are in writing, and no serious contention can be raised as to their truth. On the question of notice the learned Subordinate Judge has returned an answer against the subsequent purchaser on the bare ground that he made no inquiry of the tenant in possession. As we have said, we do not think that this by itself is sufficient to dispose of the matter. It still lies upon Sitayya however to show that before entering into the transaction, he made some inquiry. Not only has he omitted to give evidence in this case, but in a prior statement, Ex. 7, made in the course of a possession case, he acknowledged that he made no inquiry as to who was in enjoyment of the land or who paid the taxes upon it. The tax receipts, Exs. 11 series, show that the assessment upon the land had been paid by Dariya Bibi from 1915 to 1924, and it is most improbable that the Village Munsif should have been unaware of this fact which, if known, ought to have put him upon inquiry. Lastly, there is the positive evidence of Dariya Bibi's husband (D. W. 1) that Sitayya was aware that his wife had been owner of the property, as he calls it, and had been in enjoyment of it for ten years. In all these circumstances we see no reason to disturb the finding of the lower Court upon this

point, and we dismiss this appeal with costs of respondents 1—5.

The remaining Appeal No. 438, arises out of a suit for contribution filed by Sitayya against Kotayya. The claim is made under S. 69, Contract Act, or, if that is held not to apply, upon general grounds of justice, equity and good conscience. We think that, whatever the ground for allowing such a claim, an indispensable condition must be that the claimant made the payment in good faith believing in his title to property, and upon this ground alone the claim must fail in view of the finding already recorded. We dismiss this appeal also with costs.

Costs in all cases to come out of the estate of Sitayya.

P.R.S./B.V.

Appeals dismissed.

* * A. I. R. 1932 Madras 73

Full Bench

MADHAVAN NAIR, JACKSON AND
CURGENVEN, JJ.

Venkatachalam Chetti—Petitioner.

v.

Ramaswamy Servai and others—Respondents.

Civil Revn. Petn. No. 1712 of 1927, Decided on 18th September 1931, from order of Dist. Munsif, Devakottah, D/- 28th June 1927.

(a) Civil P. C. (1908), O. 22, R. 12—O. 22, R. 12, does not introduce new rule of procedure.

Order 22, R. 12, though it is a new provision introduced in the Code of 1908, does not in any way introduce a new rule of procedure but only gives the legislative sanction to the fairly well-established doctrine under the old Code that the provisions of the chapter relating to substitution upon the death, marriage or insolvency of parties, do not apply to proceedings in execution between the decree-holder and the judgment-debtor: 3 I. C. 324, *Foll.* [P 82 C 1]

(b) Civil P. C. (1908), O. 22, Rr. 3 and 12—In case of death of decree-holder execution proceedings do not abate.

Order 22, R. 12, simply means that the penalty imposed on the legal representatives of the deceased plaintiff, namely, that they should come on record to continue the suit within the time allowed by law, does not attach to execution proceedings in the case of the death of the decree-holder, or in other words, in the case of the death of a decree-holder the execution proceedings do not abate. It does not say that the legal representatives should not be brought on record in the course of execution proceedings: A. I. R. 1927 Mad. 184, *Diss. from.*; A. I. R. 1921 Mad. 599 (F. B.); 3 I. C. 324; 42 All. 570 and A. I. R. 1931 Mad. 303, *Rel. on.* [P 76 C 2]

* * (c) Civil P. C. (1908), O. 21, R. 16, O. 22, Rr. 3 and 12 and S. 146—Decree-holder dying during pendency of his petition

for execution—His legal representative can be substituted in petition and allowed to continue it: 50 Mad. 1=99 I. C. 626=A. I. R. 1927 Mad. 184, Overruled.

Though O. 22 has no application to execution proceedings, still by reason of S. 146 and O. 21, R. 16, the legal representative of a decree-holder who dies during the pendency of an execution petition can be substituted in the execution petition and be allowed to continue it. It is not obligatory on him to file a fresh application for execution: 50 Mad. 1=99 I. C. 626=A. I. R. 1927 Mad. 184, Overruled.; A. I. R. 1926 Cal. 957; A. I. R. 1927 All. 165; A. I. R. 1928 Oudh 30; A. I. R. 1921 Pat. 180; A. I. R. 1924 Pat. 576; 3 I. C. 324; A. I. R. 1929 Pat. 565 (F. B.); A. I. R. 1928 P. C. 162; A. I. R. 1925 P. C. 117; 17 M. L. J. 475 and A. I. R. 1931 Mad. 303, Rel. on.; 3 Bom. 221; 5 Bom. 246; 19 Bom. 261; 34 Bom. 142 and A. I. R. 1928 Mad. 772, Ref.

K. Balasubramania Aiyar — for Petitioner.

V. Govindarajachari—Amicus Curiae.

Madhavan Nair, J. — The question for decision in this case is whether the legal representative of the deceased decree-holder who died during the pendency of an execution petition filed by him can be substituted in his place and be allowed to continue it. The deceased decree-holder obtained a decree against the respondent in S. C. No. 266 of 1914 on the file of the Sub-Court of Sivaganga and filed several execution petitions to execute it. Before the last petition, E. P. No. 330 of 1926, was disposed of, he died. His legal representative, the petitioner before us, then applied to the Court for permission to amend the execution petition filed by his father by adding his name to it and to continue the execution proceedings. The present petition is more than 12 years after the decree and would therefore be barred by S. 48, Civil P. C., if it is treated as a fresh execution petition; but if the petitioner is allowed to continue the execution petition already filed by the deceased decree-holder, then his execution petition is not barred by limitation. The District Munsif passed the following order on the petition:

"This is an application by the legal representative of a deceased decree-holder for permission to continue the execution filed by the deceased decree-holder. The decision in *Palaniappa Chettiar v. Valliammai Achi* (1), which is applicable to the facts of the case lays down that an execution petition filed by a decree-holder cannot be prosecuted or continued after his death by his legal representative. I follow the decision and dismiss the application. The fact that the decree is more than 12 years ago is no

ground for giving the go-by to the said decision. The application is dismissed."

In *Palaniappa Chettiar v. Valliammai Achi* (1) the transferee decree-holder in a suit on the original side of this Court applied for execution of the decree. When the application was pending he died, and his widow made an application that she should be brought on record as his representative and be permitted to continue the execution petition filed by him. The learned Judge passed an order complying with her request. In appeal, this order was set aside; and the learned Judges held that it followed from the provisions of O. 22, Civil P. C., that the only course open to the legal representative in the circumstances was to file a separate and fresh application. If this decision is correct, there is no doubt that it would cover the present case as pointed out by the learned District Munsif; but doubts have been thrown on the soundness of the reasoning of the judgment in this case, in some of the subsequent decisions of this Court, especially in the decision in *Venkatalakshamma v. Seshagiri Rao* (2). In *Sundayee Ammal v. Krishnan Chetti* (3), the learned Judges (Wallace and Thiruvengkatachariar, JJ.) without saying anything about the correctness or otherwise of the ruling in *Palaniappa Chettiar v. Valliammai Achi* (1), refused to apply it to the case of an appeal against an order in execution as they were of opinion that there were obvious difficulties which will arise if the ruling is applied to cases of appeal. In *Ramanathan Chettiar v. Ramanathan Chettiar* (4), the learned Judges (Wallace and Madhavan Nair, JJ.) expressed the opinion that they were not prepared to extend to the case of a judgment-debtor the ruling in *Palaniappa Chettiar v. Valliammai Achi* (1). In C. M. S. A. No. 140 of 1928 it was expressly held by Jackson, J., that the ruling in *Palaniappa Chettiar v. Valliammai Achi* (1), would not apply to the case of a judgment-debtor. In none of these cases was the correctness of the ruling in *Palaniappa Chettiar v. Valliammai Achi* (1), directly challenged. It will be noticed that all these cases related to petitions in regard to the legal representatives of a deceased judgment-debtor and are on

(2) A. I. R. 1931 Mad. 303=131 I. C. 610.

(3) A. I. R. 1928 Mad. 772=110 I. C. 662=51 Mad. 858.

(4) A. I. R. 1929 Mad. 275=117 I. C. 705.

(1) A. I. R. 1927 Mad. 184=99 I. C. 626=50 Mad. 1.

that ground distinguishable from the decision in *Palaniappa Chettiar v. Valliammai Achi* (1), which dealt with a petition by the legal representatives of a deceased decree-holder. In the next case *Venkatalakshamma v. Seshagiri Rao* (2) which was also one which related to execution of a decree against the legal representative of a judgment-debtor, the learned Judges (Reilly and Anantakrishna Ayyar, JJ.) pointed out the abovementioned distinction between the case before them and the case in *Palaniappa Chettiar v. Valliammai Achi* (1), but directly dealt with the soundness of the judgment in *Palaniappa Chettiar v. Valliammai Achi* (1). Apart from the serious inconveniences and unjust consequences which were involved in the decision, the learned Judges pointed out that the decision was based upon an erroneous interpretation of the rules in O. 22, Civil P. C., and that the decision is in conflict with the long-established practice not only of this Court but also of other High Courts in India according to which, subject to the rule of limitation, the legal representative of a deceased decree-holder was always allowed to continue the application filed by his predecessor without being compelled to file a fresh execution application. They also pointed out that some important decisions which have a direct bearing on the question were not considered in *Palaniappa Chettiar v. Valliammai Achi* (1).

The arguments before us have proceeded more or less on the lines of reasoning adopted in *Venkatalakshamma v. Seshagiri Rao* (2), the appellant taking his stand on that decision, and the respondent arguing against it.

At the outset, it will be convenient to refer to a few of the relevant provisions of the Code of Civil Procedure. If these provisions make it necessary that a fresh application should be filed by the legal representative of a deceased decree-holder, as pointed out in *Palaniappa Chettiar v. Valliammai Achi* (1), then the ruling in that case will have to be applied irrespective of the unjust consequences that may result from its application, and also of the fact that it marks a departure from the long-established practice. Order 22, Civil P. C., deals with the procedure that should be followed on the death, marriage and insol-

vency of parties. R. 1 of that order states that:

"the death of a plaintiff or a defendant shall not cause the suit to abate if the right to sue survives."

Rr. 3 and 4 respectively provide for the substitution during the course of a suit of a legal representative for a deceased plaintiff or a deceased defendant. R. 3, with which we are concerned provides in sub-R. 1 that where a plaintiff dies and the right to sue survives:

"the Court on an application made in that behalf shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit,"

and in sub-R. 2 it is stated that

"where within the time limited by law no application is made under sub-R. 1, the suit shall abate so far as the deceased plaintiff is concerned"

Rule 4, contains a similar provision relating to the death of a defendant. These are followed by the important rule, R. 12, newly introduced in the present Code, which states that

"nothing in Rr. 3 and 4 . . . , shall apply to proceedings in execution of a decree or order."

In this connexion, I may also draw attention to two other provisions of the Code, S. 146 and O. 21, R. 16. S. 146 states:

"Save as otherwise provided by this Code, or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him."

Order 21, R. 16 provides that

"where a decree . . . is transferred by an assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder."

The reasoning adopted by the learned Judges in *Palaniappa Chettiar v. Valliammai Achi* (1) in arriving at their conclusion, is as follows: It would appear from the judgment that it was argued before them that it was open to the legal representative of a deceased decree-holder to carry on proceedings in execution under S. 146, Civil P. C., and under O. 21, R. 16. The learned Judges repelled this argument by pointing out that these provisions only declare that a proceeding which may be taken by one person may be taken by another claiming under him, and that they did not lay down any procedure. This is what they stated:

"Section 146 of the Code is of no assistance, because it merely enacts that, save as otherwise provided, a procedure which may be taken by any person may be taken by any other claiming under him. Since a decree-holder may file an execution petition, his legal representative after his death may file one. The competence of a transferee decree-holder to do this is specially provided for by O. 21, R. 16 and assuming that that rule applies by force of the words 'by operation of law' to the case of representative of a deceased decree-holder such as we are now dealing with, the matter is carried no further."

And then they pointed out that the answer to the question raised is to be found in R. 12, O. 22, read with Rr. 3 and 4. Their observations on this point which form the basis of the judgment are as follows:

"For an answer to the question raised, it is necessary to go to O. 22, which relates to the 'death' marriage and insolvency of parties.' Rr. 3 and 4 of this order respectively, provide for the substitution during the course of a suit of a legal representative for a deceased plaintiff or a deceased defendant and construing the word 'suit' so as to embrace execution proceedings R. 3 would furnish the required authority. By R. 12, however this rule (with two others) is expressly rendered inapplicable to execution proceedings, an expression of intention on the part of the framers of the rules so clear that it is really unnecessary to look further."

From these extracts it is clear that the learned Judges thought that R. 3, O. 22 with which we are concerned read with R. 12 indicated the procedure applicable to the case before them, that such a procedure being provided for by S. 146, Civil P.C. would not apply to the case and that therefore the legal representative should file a fresh application and that it was not open to him to continue the execution proceedings already pending. R. 12 says that nothing in R. 3 shall apply to proceedings in execution of a decree or order. It does not say that the legal representative should not be brought on record in the course of execution proceedings. It appears to me that the learned Judges derived their conclusion as a sort of inference from sub-R. 1, R. 3. Their reasoning seems to be this: that, if the provision in R. 3, sub-R. 1—that when a plaintiff in a suit dies and the right to sue survives the Court in the course of the suit shall make the legal representative on an application made in that behalf a party to the suit—will not apply to execution proceedings, as indeed it will not by force of R. 12, then it must follow inferentially that in the case of the death of a decree-holder during the pendency of an execution petition filed

by him, his legal representative can come on the record and proceed with the execution only by filing a separate execution petition. Otherwise he would be following the procedure of sub-R. 1, R. 3, which is declared inapplicable by R. 12. This it appears to me, amounts to, if I may say so respectfully, applying R. 3, sub-R. 1, to execution proceedings which is what is prohibited by R. 12. This construction of the rule would also result in this anomaly that, while execution proceedings can in law never abate on the death of a decree-holder, they will nevertheless abate because it is not open to the legal representative to get himself substituted in the pending execution petition. Either R. 3, O. 22, applies to execution proceedings or it does not. The legislature says distinctly in R. 12 that it does not apply to execution proceedings. What does it mean? The legislature has provided under R. 3, that if a plaintiff dies, his legal representative should come on record to continue the suit within the time allowed by law, i.e., 90 days from the date of the death of the deceased plaintiff, and if he does not do so, then the suit will abate. This is a penalty imposed upon the legal representative for not taking prompt steps to proceed with the suit. Rule 12 simply says that this penalty which applies to suits will not attach to execution proceedings in the case of the death of a decree-holder; or in other words, in the case of the death of a decree-holder the execution proceedings do not abate. This, in my opinion, is all what the rule means and nothing more. It is not necessary to pause and inquire for what reasons the legislature made this difference between suits and execution proceedings. It may be that it wanted to treat the decree-holder who has obtained a decree in his favour with more indulgence than a plaintiff who has not obtained a decree or it may be that there were other reasons. The remark of Wallis, C. J., in *Muthiah Chettiar v. Govinddoss Krishnadoss* (5), at p. 924 of 44 *Mad.* that

"the Code expressly provides by O. 22, R. 12, that nothing in Rr. 3, 4 and 8 of that order, which provide for abatements, shall apply to execution,"

shows that it was in the abovementioned sense that the learned Judge also understood the meaning of the rule. In *Mon-*

(5) A. I. R. 1921 *Mad.* 599=69 I. C. 337=44 *Mad.* 919 (F.B.).

motho Nath Mitter v. Rakhal Chandra (6), Mukerjee, J., interpreted the rule in the same way as may be seen from his observations at p. 399 where he discusses the very point now under consideration. In this connexion attention may also be drawn to the decision in *Bhagwan Das v. Jugul Kishore* (7), where, after referring to R. 3, O. 22, the learned Judges refer to R. 12 and observe that

"Rule 12 distinctly shows that this rule (R. 3) shall not apply to execution proceedings, i.e., that it is not compulsory upon a decree-holder to have the names of the heirs brought upon the record in that way, on penalty of his decree (execution application) abating."

Reilly and Anantakrishna Ayyar, JJ, also express the same opinion in *Venkata-lakshamma v. Seshagiri Rao* (2). For these reasons, with all deference to the learned Judges, I am not prepared to accept the interpretation put by them on Rr. 3 and 12 in *Palaniappa Chettiar v. Valliammai Achi* (1).

If, as I have said, nothing in R. 3, O. 22, applies to execution proceedings, then the question whether the legal representative of a decree-holder can be substituted in the pending execution application and be allowed to proceed with that application or whether he should be compelled to file a fresh application should be considered in the light of the other provisions of the Code. If R. 3, O. 22, does not apply, it is argued that there is no procedure provided in the Code for bringing on record the legal representative of a deceased decree-holder in execution proceedings. It is true that there is no specific machinery in the Code for that purpose, but does it necessarily follow from this that the Code prohibits the legal representative from making an application to continue the pending petition after substituting his name in it? I think not. If R. 3 does not apply, then obviously there can be no objection for proceeding under S. 146 of the Code and O. 21, R. 16. Under S. 146, there being no other procedure provided, a legal representative of a decree-holder may make an application which may be made by the decree-holder and under O. 21, R. 16, where a decree is transferred by assignment or operation of law as happens in the case of the death of a decree-holder, the transferee may apply for the execution of the decree. Cases have held that

where a decree-holder dies or transfers his decree pending the execution application filed by him, then the transferee decree-holder, including his heir, is entitled under O. 21, R. 16, to apply for continuing the pending execution application by substituting his name in it and that such an application is not to be considered as a fresh execution application.

In *Akhoy Kumar Talukdar v. Surendra Lal Pal* (8), at p. 737 (of 30 C. W. N.), it is stated that

"on the death of the applicant for execution, it was open to the legal representatives of the deceased decree-holder to apply immediately for carrying on the proceedings in execution of the decree or to apply for a fresh execution under O. 21, R. 16, Civil P. C. It was not necessary for them nor was it competent to make an application for substitution."

In *Baji Nath v. Ram Bharos* (9), a decree for sale had been passed on 28th September 1912. Various applications for execution of the decree had been made. The fourth application for execution was made on 22nd October 1923. During the pendency of this application, the decree-holder, Ram Lal, died and his sons applied on 28th April 1925 praying that they may be brought on record in the place of their father and the execution might be proceeded with. The question was whether this application was to be treated as a fresh application for execution in which case it would be time barred under S. 48, Civil P. C. The learned Judges held that the application was not a fresh application. The following observations in the judgment deal with the point :

"When the sons of Ram Lal, on his death, made the application of 28th April 1925, they did not ask for any fresh proceedings. They said that Ram Lal's name might be removed and the petitioners' names might be entered in the array of decree-holders. They had to make an application in the usual form of ten columns because there is no rule of law which enables the legal representative of a deceased decree-holder to apply for mere substitution of names. He must apply whenever he does apply, for execution of the decree: vide, O. 21, R. 16, Civil P. C. It is clear therefore that neither the application of 28th January 1925 nor the application of 28th April 1925, was a fresh application within the meaning of S. 48, Civil P. C."

Mr. Govindarajachari's only comment on this case is that the learned Judges, after stating the rule correctly, that there is no machinery for substituting the name of a legal representative in a

(6) [1903] 3 L. C. 324.

(7) [1920] 42 All. 570=57 L. C. 610.

(8) A. I. R. 1926 Cal. 957=96 L. C. 373.

(9) A. I. R. 1927 All. 165=104 L. C. 116=49 All. 509 (F.B.).

pending execution application, have illogically refused to apply the principle to the case before them. This is not so; for, what they say is that the legal representative cannot merely apply for the substitution of his name in a pending application but should file an application which must be an application for execution under O. 21, R. 16 and by that application the pending execution may be continued after substitution of the name of the legal representative.

The above case was followed in *Muhammad Sadiq Ali Khan v. Sajjad Mirza* (10). Referring to it, the learned Judges stated thus :

"It has been laid down in a Full Bench decision of the Allahabad High Court in *Baij Nath v. Ram Bharos* (9), that there is no rule under which the legal representative of a deceased decree-holder can or should apply merely for substitution of names. The application should be for execution. We take the same view."

No doubt, as pointed out by Mr. Govindarajachari, the question, whether the application was a fresh one or one merely to continue the pending application, was not very material in this case as, having regard to the dates, the plea of limitation under S. 48, Civil P. C., could not have been raised with respect to it.

In *Mt. Gulab Kuer v. Mohammed Zaffar Hussain Khan* (11), a decree was passed on 3rd February 1908. An execution petition has been filed on 7th November 1918. The facts show that this petition was well within time. During its pendency the decree-holder assigned his interest in the decree to his son and on 24th January 1920 the son applied for the substitution of his name in the place of his father. It was contended that, as this application for substitution was beyond the period of 12 years from 3rd February 1908, the application was barred by limitation under S. 48, Civil P. C. The Court refused to treat the application in question as a fresh application for execution but held that the application should be considered to be one under O. 21, R. 16, Civil P. C., and that it was in substance an application in continuation of the proceedings then pending in the Court and that no question of limitation arose in the circumstances of the case. This decision was followed in *Mt. Bhagavanta Kuer v.*

Zawir Ahmad Khan (12), the learned Judge (Adami, J.), remarking about the petition in question that,

"when the petitions for substitution of the transferees were filed on 7th June 1919, and were granted on 14th June there was no reason why execution should not have proceeded with the transferees substituted for the decree-holders; and there was no necessity to strike off the execution proceedings."

I shall now refer to two decisions where the application of R. 12, O. 22 arose in an appeal filed against an order in execution proceedings and not in the course of the execution proceedings itself as in the cases already examined: see *Monmotha Nath v. Rakhal Chandra Tewary* (6) and *Hakim Syed Muhammad Taki v. Fateh Bahadur Singh* (13). In *Monmotha Nath Mitter v. Rakhal Chandra Tewary* (6), it was held that, when the decree-holder, the appellant, died in the course of an appeal preferred against an order in execution, it was open to his legal representatives to continue the appeal and that O. 22, R. 12 read with Rr. 3 and 4 was no bar. In that case a preliminary objection was taken that, upon the death of the appellant, his legal representatives were not entitled to prosecute the appeal and in support of the objection reliance was placed upon O. 22, R. 12 of the Code. The objection was characterised as one :

"of a somewhat novel character and not worthy of serious consideration but for the insistence with which it was pressed."

After pointing out that even before the present Code the Court held that the corresponding provisions of the old Code did not apply to execution proceedings and that Courts had power to bring legal representatives of deceased decree-holders in pending execution applications, the learned Judges observed that this practice cannot be considered to be negatived by R. 12, O. 22. In *Hakim Syed Muhammad Taki v. Fateh Bahadur Singh* (13) it was held, Das, J., dissenting, that, by virtue of R. 12, O. 22, Rr. 3 and 4 did not apply to appeals arising out of an order passed in the course of a proceeding in execution of a decree or order and that therefore such an appeal does not abate on the death of the respondent, if the appellant fails to apply and make the legal representative of the deceased

(10) A. I. R. 1928 Oudh 30=105 I.C. 611=3 Luck. 126.

(11) A.I.R. 1921 Pat. 180=62 I.C. 30=6 Pat. L. J. 358.

(12) A.I.R. 1924 Pat. 576=78 I.C. 766=3 Pat. 596.

(13) A.I.R. 1929 Pat. 565=122 I.C. 148=9 Pat. 372 (F.B.).

respondent a party to the appeal within the time prescribed by law. The dissenting judgment of Das, J. was pressed before us by the respondent with great force, but I am inclined to accept the view of the majority of the Bench. It follows from these decisions that in appeals also the same view of R. 12, O. 22 was accepted, as in the case of execution petitions. I have already drawn attention to *Sundayee Ammal v. Krishnan Chetti* (3) where this Court refused to apply *Palaniappa Chittiar v. Valliammai Achi* (1) to an appeal against an order in execution.

In view of the above decisions I fail to see how the legal representative of a deceased decree-holder cannot be permitted to substitute his name in a pending execution application and proceed with it. It is said that, having regard to the definition of the term "decree-holder" in the present Code, which does not include any person to whom a decree or order is transferred as under the definition of the term under the old Code of 1882, the conclusion arrived at by the learned Judges in these cases is based upon the old notion of the term and is therefore open to objection; and that the transferee will not acquire the status of a decree-holder until after an order in execution is made in his favour. But I cannot see why that order cannot be made in the pending execution petition itself ordering execution to proceed just as in a fresh execution application. It appears to me that the change in the definition of the term "decree-holder" does not really affect the question.

I shall now refer to two Privy Council decisions relied on by the petitioner in support of his contention, i. e., *Jang Bahadur v. Bank of Upper India, Ltd. Lucknow* (14) and *Kedarnath Goenka v. Anant Prasad Singh* (15). These decisions do not directly bear on the point; but there are observations in them which would help the appellant. In *Kunwar Jang Bahadur v. Bank of Upper India, Ltd. Lucknow* (14), at page 550 (of 55 M. L. J.) their Lordships of the Privy Council observed that:

"If the judgment-debtor dies before any such certificate is issued, the Court of transfer does not lose its jurisdiction over the execution pro-

ceedings, which does not abate by reason of the death. But before execution can proceed against the legal representative of the judgment-debtor, the decree-holder must get an order for substitution from the Court which passed the decree. This is a matter of procedure and not of jurisdiction."

In this case, their Lordships were considering whether a Court to which a decree has been transferred had jurisdiction to bring on record the legal representative of a deceased judgment-debtor; and the certificate referred to in the extract quoted above refers to a certificate as regards satisfaction of the decree. From the statement of their Lordships it is clear that an execution proceeding does not abate by reason of the death of a judgment-debtor and that the decree-holder may proceed against him after getting an order for substitution from the Court which passed the decree and this is referred to as a matter of procedure. I think it follows fairly from these observations that it is not necessary that the decree-holder should resort to a fresh application for execution to proceed against the legal representative of the deceased judgment-debtor. It seems to me that the passage suggests that he may get the name of the legal representative substituted in the pending execution application itself which has not abated and may then proceed with that application for execution. The judgment of their Lordships in *Kedarnath Goenka v. Anant Prasad Singh* (15), the other Privy Council case, is very brief and does not contain the facts of the case.

Their Lordships approve of the following passage in Das, J's judgment which they quote in their own judgment:

"I hold that under the Code of 1882 a proceeding for the ascertainment of mesne profits was a proceeding in execution, that as the decree in the present case was passed under the Code of 1882, such proceedings must be held in execution and not in the suit. That being so, O. 22, R. 12, applies and it must follow that substitution was not necessary."

The facts of the case are these. The Subordinate Judge in 1905 made a decree for possession and mesne profits. Appeals to the High Court and to the Privy Council were dismissed, the latter in 1913 and inquiry as to the mesne profits recoverable was held subsequently and during it, in 1918, two of the plaintiffs, Bhoop Narain Singh and Baijnath Singh, died. About two years after, the sons of Bhoop Narain Singh obtained an ex parte order to be substituted on the

(14) A.I.R. 1928 P.C. 162=109 I.C. 417=55 I.A. 227=3 Luck 314 (P.C.).

(15) A.I.R. 1925 P.C. 117=88 I.C. 482=52 I.A. 188=4 Pat. 507 (P.C.).

record for their father. The appellant then contended that the order of substitution should be cancelled and that the suit had abated as the legal representatives had not been brought on record within six months. The petitioner contends that this decision may be taken to be an authority for holding that the inquiry as to mesne profits being a proceeding in execution under the Code of 1882, O. 22, R. 12, applies to it, and that there is no abatement under O. 22, R. 3, and that therefore no substitution (of the legal representative) was necessary. Though it may not be quite clear as to what was exactly meant by "substitution was not necessary," I think that on the authority of this decision the petitioner may well contend that the legal representative is, at any rate, entitled to ask the Court to substitute his name in the pending petition and to proceed with the execution.

In the light of all the above decisions I would hold that the legal representative of a decree-holder who died during the pendency of an execution petition filed by him can be substituted in his place in the execution petition and be allowed to continue it.

The petition by the legal representative being an application for the execution of the decree, the question may arise as to what article of the Limitation Act should be applied to such an application. The point is one of some difficulty; but it is not necessary to discuss it here as it does not arise in this case. However I may observe that if there is difficulty in applying Art. 182, Limitation Act, then why should not such an application be treated as one governed by Art. 181? I think authority may be found in support of this position: see *Kalyani Pillai v. Thiruvankadaswami Ayyangar* (16), but I do not desire to express any definite opinion on the point, as it was only glanced at in the course of the arguments.

Under the old Code also some Courts in India had to consider whether the legal representative of a decree-holder or a judgment-debtor could be substituted in a pending execution petition and be allowed to continue the execution. Ss. 363, 364 and 366 of the Code of 1882 correspond to O. 22, R. 3 of the present Code. S. 368 corresponds to

O. 22, R. 4. There was no section in the old Code corresponding to R. 12, O. 22.

The earliest case brought to our notice is the decision in *Gulabdas v. Lakshman Narhar* (17) which related to the death of a decree-holder. In that case one Lakshman was allowed to continue the execution proceedings begun by his father. The actual decision turned on the question of limitation; but in dealing with it the learned Judges referred to S. 365 relating to the death of a sole plaintiff and observed that

"the Code of Civil Procedure does not provide that applications for execution shall like suits, abate by the death of a judgment-debtor, nor have any cases been cited to us to show that the analogy of the sections applicable to pending suits governs pending proceedings in execution."

It is worthy of notice that this opinion was expressed even though there was no rule in the old Code corresponding to R. 12. It was also contended in that case that the deceased decree-holder's sons could not come in as mere representatives to carry out his application, but they were bound as representatives to make a new application on their own accord. This is precisely the very argument that is now put before us. The learned Judges did not decide the question as the objection was not taken before, but they observed that "it goes rather to the form than to the substance of their application."

Though the point was not expressly decided, it is easy to see which way the inclination of the learned Judges lay. The next case, *Govind Shanbhag v. Appaya* (18), which was also a case of a deceased decree-holder, does not throw much light on the matter. The same may be said about the case in *Keshavlal Bechar v. Pitamberdas Tirbhuvandas* (19). In *Purushottam v. Rajbai* (20), which related to the death of a judgment-debtor during the pendency of an execution petition, it was held

"when execution proceedings are commenced against a judgment-debtor, they can be continued after his death by substituting the name of the legal representative in place of that of the deceased judgment-debtor in the application for execution. It is not necessary to file a fresh application under the provisions of S. 235, Civil P. C. (O. 21, R. 11)."

In the course of their judgment the learned Judges referred to a prior deci-

(17) [1878] 3 Bom. 221.

(18) [1880] 5 Bom. 246.

(19) [1895] 19 Bom. 261.

(20) [1910] 34 Bom. 142=4 I. C. 839.

(16) A. I. R. 1924 Mad. 695=80 I. C. 85=47 Mad. 618.

sion of their own Court, *Hirachand Harjivandas v. Kasturchand Kasidas* (21) and said :

"Sections 361 to 372, Civil P. C., do not relate to proceedings in execution;"

and further on observed that

"no authority has been cited to us in support of the contention that execution proceedings already commenced cannot be continued after the death of the judgment-debtor by substitution of the name of the legal representative in place of that of the judgment-debtor in the application for execution. We think therefore that there is no objection to the continuance of the execution proceeding against the present respondent without fresh application under S. 235."

This decision may well be taken as an express authority for the position that in Bombay the same interpretation that is now sought to be put on O. 22, Rr. 3, 4 and 12, was definitely put on the corresponding sections of the Code of 1882 and that under that Code, an execution petition pending against a deceased judgment-debtor was allowed to be continued without filing a fresh application for that purpose.

In Madras the question does not seem to have been dealt with explicitly in any decision under the old Code ; but there is a decision in *Appani Ayyangar v. Dharni Mudaly* (22), which has some bearing on the point. In that decision it was held by Benson and Miller, JJ., that an application by the legal representative of a decree-holder for an order recognizing him as the decree-holder is not prohibited by the Civil Procedure Code and consequently, such an application is a step-in-aid of execution within the meaning of Cl. 4, Art. 179, Limitation Act. If so, it would be unreasonable to call such an application a fresh application. This decision is really not opposed to the previous decision in *Ramachandra Ayyar v. Subramania Chettiar* (23), in which it was held that a transferee decree-holder cannot apply merely for recognizing him as transferee inasmuch as by force of the definition of the term "decree-holder" he himself is a decree-holder ; and it was for this reason that the learned Judge held in that case that a transferee decree-holder can only apply to execute the decree. In Madras, as a matter of "practice," the legal representative of a deceased decree-holder who dies pending an execution application filed by him has

always been allowed prior to the decision in *Palaniappa Chettiar v. Valliammai Achi* (1), to continue the pending petition by substituting his name without being put to the necessity of filing a fresh execution application. No decisions of the other High Courts under the old Code of 1882 have been cited before us ; but judging from the decisions of those Courts under the present Code, there is no reason to believe that under the old Code they followed a different procedure. On the whole I am inclined to think that the practice in Indian Courts was always to allow the legal representative of a deceased decree-holder to continue the pending execution petition filed by him by substituting his name in it in the place of the deceased decree-holder and then to proceed with the execution. I do not think his application to proceed with the execution petition was ever considered in the light of a fresh execution petition. If this view is correct, then the decision in *Palaniappa Chettiar v. Valliammai Achi* (1) is in conflict with the well-established practice of this and other Courts.

That decision has also seriously affected the rights of the legal representative of a deceased decree-holder. The following extract from the judgment of Ananta-krishna Ayyar, J., in *Venkatalakshamma v. Seshagiri Rao* (2), at pp. 370 and 371 (of 33 L. W.), will make this point clear :

"If the only remedy open to the legal representative of a deceased decree-holder in such a case be to file a fresh execution petition then fresh pleas of limitation might be open to the judgment-debtor, the intervening period affording him basis for such contention. Attachments which were effected pending the prior execution petition would *prima facie* no longer be available when a fresh execution petition is filed. The advantages which a decree-holder has as a result of his having filed execution petition, such as the right to share in the proceeds of auction sales held by the same Court after the filing of such execution petition might not be necessarily available to him on such fresh execution petition. Other disadvantages to the decree-holder's representative also could be readily imagined ; see also the remarks of Reilly, J."

Of course if the legislature has deliberately introduced a change in the existing procedure then disastrous consequences notwithstanding, that procedure has to be followed ; but I have endeavoured to show in this judgment that no such change has been introduced in the Code by the insertion of R. 12 in O. 22. If a change was

(21) [1894] 13 Bom. 221.

(22) [1907] 17 M. L. J. 475.

(23) [1904] 14 M. L. J. 393.

intended, then having regard to the long continued practice in Courts, the legislature would have expressed its intention in clearer and more explicit terms. In my opinion, R. 12, O. 22, Civil P. C., though it is a new provision introduced in the Code of 1908, did not in any way introduce a new rule of procedure but only gave in the words of Mukerjee, J., in *Monmotho Nath Mitter v. Rakhal Chandra Tewary* (6), at p. 399 :

"The legislative sanction to the fairly well-established doctrine under the old Code that the provisions of the chapter relating to substitution upon the death, marriage or insolvency of parties, do not apply to proceedings in execution between the decree-holder and the judgment-debtor."

In this view, for the reasons mentioned above, I must express my respectful dissent from the decision in *Palaniappa Chettiar v. Valliammai Achi* (1). I would therefore set aside the order of the learned District Munsif and ask him to restore the petition to his file and proceed with it according to law. I make no order as to costs.

In conclusion, I must express my thanks to Mr. Govindarajachari who has argued the case ably as amicus curiae for the respondent.

Jackson, J.—I agree, and would also like to express my thanks to Mr. Govindarajachari. If nothing in Rr. 3, 4, 8, O. 22, shall apply to proceedings in execution of a decree, then Rr. 3, 4 and 8 have nothing whatsoever to do with execution proceedings. To evolve from Rr. 3, 4 and 12 a precept like the headnote to *Palaniappa Chettiar v. Valliammai Achi* (1) :

"the legal representative of a decree-holder who died during the pendency of an execution petition filed by him cannot be substituted in his place in the execution petition and be allowed to continue it,"

is, in effect, to do precisely what R. 12 deprecates, and to apply Rr. 3 and 4 to execution proceedings, deriving from their silence, as it were, a fresh sub-clause to these rules, with a most curious result ; for, read with this addition, R. 3 lays down that on the death of the decree-holder the execution proceedings shall never abate, but shall nevertheless always abate because no one can be substituted in his place.

It seems better therefore at the outset to treat O. 22 as having no application to execution proceedings, and then this question whether the legal representative can

be brought on in the pending execution petition instead of being relegated to a fresh application would seem to present little difficulty. Under S. 146 a proceeding taken by a person may be taken by the person claiming under him, and if O. 22 has nothing to do with the matter, it does not provide otherwise. Then under O. 21, R. 16, a transferee by operation of law, as heir for instance, may apply for execution. As clearly set forth on p. 617, Edn. 8 of Mr. Mulla's Civil Procedure Code, where a decree-holder applies for execution and pending execution assigns his interest in the decree an application by the transferee of the decree for substitution of his name is not a fresh application for execution but merely an application for continuing the execution proceedings then pending.

For this statement there is ample authority :

"On the death of the applicant for execution it was open to the legal representatives of the deceased decree-holder to apply immediately for carrying on the proceedings in execution of the decree or to apply for fresh execution : *Akhoy Kumar Talukdar v. Surendra Lal Pat* (8), at p. 737 (of 30 C. W. N.).

"When the sons of Ram Lal on his death made the application they did not ask for any fresh proceedings. . . . He must apply for execution of the decree. . . . but it was not a 'fresh application' : " *Baij Nath v. Ram Bharos* (9), at pp. 514 and 515 (of 49 All.).

"We take the same view." *Muhammad Sadiq Ali Khan v. Sajjad Mirza alias Munney Agha* (10) at pp. 127 and 138 (of 3 Luck). "There was no reason why the execution should not have proceeded with the transferees substituted for the decree-holders" : *Mt. Bhagvanta Kuer v. Dewan Zamir Ahmad Khan* (12) at p. 604 (of 3 Pat.)."

In the light of these rulings Mr. Mulla pays an exaggerated compliment to our Court, by the above note from his 9th Edn. and relegating *Mt. Bhagvanta Kuer v. Dewan Zamir Ahmad Khan* (12) at p. 604 (of 3 Pat.) to the realm of obsolete cases governed by the old Code. In the old Code the definition of "decree-holder" included a person to whom a decree is transferred. In the present Code, S. 2 (3) runs :

"Decree-holder means any person in whose favour a decree has been passed or an order capable of execution has been made."

As observed by Mr. Mulla (p. 661) the transferee may not acquire the status of a decree-holder until an order for execution is made in his favour, but that order can as well be, let th

pending execution proceed, as let a fresh execution begin.

Curgenven, J.—The case-law, most of which was not cited before us in *Palaniappa Chettiar v. Villiammai Achi* (1) presents some curious features, but since there is no doubt that it is very preponderantly in favour of giving Courts the power now in question, to survey it is not within my present purpose. I wish only to say a word or two about the grounds of our decision in the case which has given rise to this Full Bench.

Upon general principles of procedure, and apart from the specific provisions of the Code, there are two ways in which the legal representative of a deceased decree-holder may conceivably enforce the decree, either (a) by an original application to enforce it, or (b) by obtaining leave to continue an execution proceeding already begun by his predecessor.

Section 146 enacts that "save as otherwise provided" where any proceeding may be taken by any person, then the proceeding may be taken by any person claiming under him. That in express terms provides that, unless a rule exists to the contrary course (a) is open to the legal representative of a decree holder. It says nothing about course (b) unless it be held that the one necessarily includes the other. Similarly O. 21, R. 16, which enables a transferee to apply for the execution of a decree does not expressly enable him to apply to continue a proceeding already pending when his predecessor died. If the Code provided elsewhere against such a course, the provision would not be in conflict with the terms of this rule. Turning now to suits, there can be no question, I think that in the case of a suit the power of a Court to allow a legal representative to proceed with the suit is specifically derived from R. 3, O. 22. Sub-R. (1) says:

"The Court on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party, and shall proceed with the suit."

It may be true that this rule, besides giving the power, does other things, but it cannot seriously be argued that that circumstance makes it any the less an empowering rule. R. 12, O. 22, says that nothing in this rule shall apply to execution proceedings. In the case of such proceedings, can we look elsewhere for

the power. In *Palaniappa Chettiar v. Valliammai Achi* (1) we answered "No." If in one place in the Code, dealing specifically with the process of substituting a legal representative for the purpose of continuing a proceeding, the power is expressly given in the case of a suit, and as expressly withheld in the case of an execution proceeding, it is not permissible, we thought, to have recourse to a general provision, to be found elsewhere which liberally construed, might in the absence of the mere specific provisions afford the required power. It is I still think not an unreasonable inference that the terms of O. 22 qualify O. 21, R. 16. I observe that Reilly, J., who in *Venkatalakshamma v. Seshagiri Rao* (2) has some hard words to say about our decision, appears to assume that the problem of construction would be unaffected if Rr. 3 and 4, O. 22, had no existence. Such an alteration in the Code would of course remove the whole difficulty we felt in deciding *Palaniappa Chettiar v. Valliammai Achi* (1), which was created by the terms of those rules. Perhaps an illustration will make the point clearer. Suppose I am the proprietor of a theatre, and say to my manager:

"Subject to any rules I may make, you may order matters according to your discretion."

I make a rule:

"Men may smoke in the theatres, but this does not apply to boys under 16."

If I find boys under 16 smoking and ask my manager for an explanation, should I be satisfied if he answered:

"Your rule said that it did not apply to boys under 16, so as regards them I acted as though it had no existence, and fell back on my general discretionary powers?"

If the framers of the Code were willing to concede this most important power to executing Courts, it is a little surprising to me that they should have failed to provide an express rule, and should have left the Courts, in the words of Anantakrishna Ayyar, J., "to mould its procedure according to the equities of the case;" and the legislature seems to have left the question of limitation to take care of itself, with results which, thanks probably to an erroneous view of the law, have not yet become fully apparent. I agree that if O. 21, R. 16 may be read as if it said:

"The transferee may apply for execution of the decree, or for leave to continue a proceeding in execution pending at the date of the transfer."

the question of the effect of R. 12, O. 22, in debarring a transferee from continuing an execution petition would assume a different aspect; nor would I demur to reading it in this way if O. 22 formed no part of the Code. I confess that, as matters stand, I still find a difficulty in extracting the required power from the terms of the Code. But since that power has been so universally exercised, and so generally assumed by the Courts to exist, I do not dissent from a construction which achieves the desired object. I must add my own thanks to Mr. Govindarajachari for the great assistance which he has given us in this case.

P.R.S./P.N.

Order set aside.

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MADHAVAN NAIR, J.

(Peria Veedu) Abdul Majid Sahib—
Defendant—Appellant.

v.

Arunachala Mudaliar and others—
Plaintiffs—Respondents.

Second Appeal No. 478 of 1928, Decided on 29th July 1931, against decree of Dist. Judge, North Arcot, Vellore, in Appeal Suit No. 20 of 1927.

Transfer of Property Act (1882), S. 101—D holding mortgage over two items of property—Same property mortgaged subsequently to P—First item sold to D in discharge of his mortgage—No intention either in keeping alive charge in favour of D or of extinguishing it—It should be assumed that D intended to keep alive his mortgage.

D held a mortgage over certain property consisting of two items and the same property was subsequently mortgaged to P. The first item of the property was afterwards sold to D in discharge of his mortgage over the two items and at the time of the purchase D had no knowledge of the existence of the mortgage in favour of P. There was no evidence of intention of D either in favour of keeping the charge alive or of extinguishing it. In a suit brought by P, D contended that his prior mortgage right over the first item of the property should be regarded as still alive and that P should redeem it before he could succeed.

Held: that there being no evidence of intention either way it should be assumed that D intended to keep alive his mortgage since it was to his interest to do so, there being another mortgage on the same property and that P was not entitled to a decree for sale without paying the mortgage amount due to D under his mortgage: 10 Cal. 1035 (P.C.); 39 Cal. 527; A. I. R. 1924 P. C. 36; A. I. R. 1925 Mad. 1217; A. I. R. 1921 Mad. 693; A. I. R. 1927 All. 211 and A. I. R. 1930 Cal. 619, Rel. on.; 30 Mad. 67; 34 Mad. 119 and A. I. R. 1914 Mad. 693, Ref. [P 85 C 1]

A. Viswanatha Ayyar and A. Ramaswami Ayyar—for Appellant.

B. C. Seshachala Ayyar—for Respondents.

Judgment.—Defendant 3 is the appellant. He held a mortgage dated 26th May 1919 over the suit property which consists of two items. A mortgage of the same property had been executed in favour of the plaintiffs on 10th July 1919. On 23rd November 1925 the first item of the suit property was sold to defendant 3 in discharge of the mortgage over the two items. Defendant 3 thus became the owner of item 1 and as a result of his purchase item 2 was freed from his mortgage. When he purchased item 1, defendant 3 did not know about the existence of the mortgage in plaintiff's favour. The suit property belonged to the father of defendants 1 and 2. The second appeal arises out of a suit instituted by the plaintiffs to enforce their mortgage over the two items. The appellant contended that his prior mortgage right over item 1 should be regarded as still alive and that the plaintiffs should redeem it before they could succeed. This contention was rejected by the lower Courts and the only question argued in the second appeal is whether this contention should have been upheld.

It is common ground that the question should be decided with reference to the intention of the appellant as to when he purchased item 1, whether he had intended to keep his own mortgage over it alive as a shield against the other mortgages. S. 101, T. P. Act, provides that if a mortgagee or a charge-holder of property acquires the interest of the mortgagor or the owner, his own charge or mortgage becomes extinguished unless he declares by express words or necessary implication that it shall continue to subsist or such continuance would be for his benefit. The section raises a presumption in favour of merger rebuttable by proof of an intention to the contrary. There is no evidence regarding the intention of defendant 3 either way. In *Gokaldas Gopaldas v. Peramal Prem-sukhdas* (1) their Lordships of the Privy Council held that, where a man who pays off a mortgage has a right to extinguish it and a right to keep it alive in the absence of express evidence of intention, he

(1) [1884] 10 Cal. 1035=11 I.A. 126 (P.C.).

should be assumed to have acted according to his interest : see also *Mahomed Ibrahim Hossain Khan v. Ambika Pershad Singh* (2). In *Mali Reddi Ayya Reddi v. Gopalakrishnayya* (3), the Privy Council has again remarked as follows :

"It is now settled law that where in India there are several mortgages on a property, the owner of the property, subject to the mortgages may, if he pays off an earlier charge treat himself as buying it and stand in the same position as his vendor, or to put it in another way, he may keep the incumbrance alive for his benefit and thus come in before a later mortgagee."

As pointed out by Sir Gour in his *Transfer of Property Act*, Vol. 2, the Privy Council

"by laying emphasis on the proviso and the intention of the parties in S. 101 were inclined to minimise the force though without entirely ignoring the existence of the initial statutory presumption in S. 101, T. P. Act."

In *Tiruvengadam Pillai v. Sabapathi Pillai* (4), Phillips, J., went to the extent of holding that :

"when a person purchasing property discharges a prior mortgage on the same and claims subrogation therefrom, the Court should start with the presumption that a person paying off a mortgage intends to keep it alive if it is for his benefit to do so" : (see the head note.)

Effect to the decisions of the Privy Council has been given in the new S. 101, T. P. Act, which replaces the old section. The new section runs as follows

"Any mortgagee of, or person having a charge upon, immovable property, or any transferee from such mortgagee or charge-holder, may purchase or otherwise acquire the rights in the property of the mortgagor or owner, as the case may be, without thereby causing the mortgage or charge to be merged as between himself and any subsequent mortgagee of, or person having a subsequent charge upon the same property ; and no such subsequent mortgagee or charge-holder shall be entitled to foreclose or sell such property without redeeming the prior mortgage or charge, or otherwise than subject thereto."

If we give effect to the principle of the Privy Council decisions in the present case, there being no intention either way, I think it should be assumed that the appellant intended to keep alive his mortgage since it was to his interest to do so, there being another mortgage on the same property. In *Srinivasachari v. Gnanaprakasa Mudaliar* (5), the decision relied on by the lower Court, it was held that

"where a person paying off a prior mortgage, purchases a portion of the mortgaged property

(2) [1912] 89 Cal. 527=39 I.A. 68=14 I.C. 496 (P.C.).

(3) A.I.R. 1924 P.C. 36=79 I.C. 592=51 I.A. 140=47 Mad. 120 (P.C.).

(4) A.I.R. 1925 Mad. 1217=90 I.C. 767.

(5) [1907] 30 Mad. 67=2 M.L.T. 36.

in consideration of the amount so paid by him, the lien acquired by such payment is extinguished and cannot be used by such purchaser as a shield against a subsequent mortgagee."

This decision no doubt supports the respondents. This case has been referred to and distinguished in *Govindasami Tevan v. Dorasami Pillai* (6) and *Subramania Pillai v. Palaniappa Mudali* (7). In *Kutti Tevan v. Rayappa Goundan* (8), defendant 8 had bought the equity of redemption in 3/10 (that is, item 3 of the property over which he held a mortgage) and the learned Judges observed thus :

"If defendant 8's mortgage was executed first, he must, on the facts found, be regarded as having intended to keep alive his mortgage rights when he purchased the equity of redemption in item 3."

This observation supports the appellant and in my opinion gives full effect to the spirit of the Privy Council decisions. No doubt the observation is in the nature of an obiter dictum and it does not refer to the decision in *Srinivasachari v. Gnanaprakasa* (5). The decisions of the other Courts in *Madho Singh v. Pancham Singh* (9) and *Jasodhakumar v. Kali Kumar*, A. I. R. 1930 Cal. 619 and 572, brought to my notice by the learned advocate for the appellant fully support him. Having regard to the decisions of the Privy Council, the general trend of the decisions of this Court and the new S. 101, T. P. Act, I am not inclined to treat the authority of *Srinivasachari v. Gnanaprakasa Mudaliar* (5) on this particular point as going beyond the actual decision. I would therefore hold that the plaintiffs are not entitled to a decree for sale without paying the mortgage amount due to defendant 3 under his mortgage. The decree of the lower Court will be modified accordingly. The appellant will get his costs throughout.

P.R.S./P.N.

Decree modified.

(6) [1911] 34 Mad. 119=6 I.C. 781.

(7) A.I.R. 1914 Mad. 698=21 I.C. 978

(8) A.I.R. 1921 Mad. 698=65 I.C. 961.

(9) A.I.R. 1927 All. 211=101 I.C. 409=49 All. 233.

A. I. R. 1932 Madras 86REILLY AND ANANTAKRISHNA
AYYAR, JJ.(Kasarabada) Venkatachalapathi Rao—
Appellant.

v.

(Gadiraju) Venkatappayya and another
—Respondents.

Letters Patent Appeal No. 349 of 1926, Decided on 1st September 1931, against decree of Devadoss, J., D/- 20th August 1926, in Second Appeal No. 1805 of 1923, reported in *A. I. R. 1927 Mad. 450*.

(a) Civil P. C. (1908), S. 47—Purchaser of property after attachment in execution proceeding is bound by decision of executing Court though not party to it — Civil P. C. (1908), S. 64. *A. I. R. 1927 Mad. 450, Reversed.*

When proceedings by way of attachment of immovable property in execution of a money decree have been taken by the execution Court in an execution application filed by the decree-holder, any question that might be raised whether the proceedings taken by the Court did amount to a valid attachment or not, is one that falls to be decided by the Court in the execution department; any stranger purchasing the property from the judgment-debtor in those circumstances would only take the property subject to the Court's decision as to the effect of the proceedings actually taken before his purchase. Such purchaser would be bound by the Court's decision of the question in the execution department though he was not party to the same. To hold otherwise would be to impair the rights of the decree-holder and to enable the judgment-debtor to set at naught decisions of Courts competent to adjudicate on the rights of parties, and give the go-by to the principle of the law giving finality to decisions of Courts in matters properly before them.

It is not open to a party to a proceeding to nullify the effect of proceedings already properly taken with reference to that property by transferring the same to strangers. It does not really matter whether the actual decision of the Court as to the effect of the past proceedings is given only after the plaintiff's purchase, if the adjudication is really with reference to matters that happened before such purchase and regarding the effect of the legal proceedings that were had prior to the same. To safeguard the purchaser's rights, the purchasers should in such circumstances get themselves impleaded as parties. *A. I. R. 1927 Mad. 450, Reversed.* [P 89 C 1,2]

(b) Civil P. C. (1908), S. 11 — Execution—Decision that has become final cannot be set aside by party on the ground that full facts were not placed before Court — He cannot reopen that question in absence of fraud or collusion—Civil P. C., S. 47.

Orders passed in the course of execution proceedings adjudicating on the rights of the parties are res judicata and cannot be called in question by the parties or their representatives. When once the said orders become final, that effect cannot be sought to be avoided by making allegations that the previous decisions were wrong on the merits because full facts were not

placed before the Court or that all available evidence was not let in on the former occasions: 6 *All. 269 (P. C.)* and *A. I. R. 1921 P. C. 23, Ref.* [P 90 C 1]

A obtained a money decree against B in execution of which he applied for attachment of certain immovable property. On 14th March 1914 the executing Court passed an order for attachment of the property. In the meanwhile the judgment-debtor who had filed an appeal against the decree obtained an ad interim order from the appellate Court on 13th March 1914 which was received in the executing Court on 16th March 1914 and before the amin was informed of the order the amin reported on 17th March 1914 that attachment was carried out on that very date (17th March) by affixing a copy of the proclamation on the land. A similar copy was affixed to the Court-house and Collector's office on 23rd March 1914. On 27th May 1914 the judgment-debtor sold the attached property to the plaintiff. On 6th October 1914 the judgment-debtor applied to the Court under S. 47 to have the attachment and decree-holder's application for sale cancelled. This application was granted by the executing Court but its order, though confirmed on appeal by the appellate Court, was reversed by the High Court in Second Appeal on 18th December 1917. On 26th August 1918 the plaintiff applied under O. 21, R. 58 to have the attachment raised on the ground that there was no valid attachment on the properties on the date of his purchase. His objection was dismissed, whereupon he filed the present suit under O. 21, R. 63 for setting aside the order passed on his claim.

Held: that the decision in second appeal of the High Court in the execution proceedings was binding on the plaintiff and he could not claim to reopen it on the mere ground that the full facts of the case had not been presented before the High Court and in the absence of fraud or collusion. [P 89 C 2]

S. Varadachariar and V. Viyanna —
for Appellant.

P. Somasundaram—for Respondents.

Anantakrishna Ayyar, J. — Defendant 1 in O. S. No. 142 of 1920 on the file of the Additional District Munsif's Court of Narasapur is the appellant before us. He was the plaintiff in O. S. No. 38 of 1912 on the file of the Principal District Munsif's Court, Narasapur, wherein he obtained a decree for money against M. Venkataramanayya on 30th September 1913. He applied to execute his decree in O. S. No. 38 of 1912 by attachment and sale of certain immovable property, and on 14th March 1914 the District Munsif passed an order for attachment. In the meantime, M. Venkataramanayya, having filed an appeal against the District Munsif's decree, obtained an ad interim order staying execution from the appellate Court on 13th March 1914. The interim stay order was received in the District Munsif's Court on 16th March 1914, and before

the amin was informed of the order, the amin reported, on 17th March 1914, that attachment was carried out on that very date (17th March) by affixing a copy of the proclamation on the land. Subsequently an interim order was vacated on 15th April 1914 as the judgment-debtor failed to furnish security as required by the appellate Court. Venkataramanayya filed an application, M. P. No. 1950 of 1914, on 6th October 1914, under S. 47 of the Code, alleging that the attachment made on 17th March 1914, after the appellate Court ordered stay of execution was ultra vires and illegal, and that the application for sale made by the decree-holder on the strength of the said attachment was not maintainable; and he prayed that "the Court may cancel the attachment and the sale application made by the decree-holder." The District Munsif overruled the contentions of the decree-holder and directed that "the attachment in question be raised and all further proceedings following thereon quashed." On appeal the said order was confirmed by the Subordinate Judge. When the appeal was pending, Venkataramanayya died and his widow Kameswaramma was brought in as his legal representative by the appellate Court. The decree-holder, in O. S. No. 38 of 1912, preferred a civil miscellaneous second appeal to the High Court. There was a reference to the Full Bench in that civil miscellaneous second appeal. The Full Bench held:

"Where subsequent to an ad interim order for stay of execution made by an appellate Court without notice to the decree-holder, but before its communication to the Court of first instance, an order of attachment is made by the latter Court, the order of attachment is not void and ineffectual as having been made without jurisdiction, but is legally valid, and that the order is effective only from the time it is communicated to the first Court." *Venkatachalapathi Rao v. Kameswaramma* (1).

The case came on for final disposal before the referring Judges (Abdur Rahim and Bakewell, JJ.), and they passed the following judgment in the case on 18th December 1917:

"The appeal will be allowed, the respondent's petition dismissed, and the attachment restored. The appellant will recover his costs from the respondent throughout."

On the allegation that by a sale deed dated 27th May 1914 Gadiraju Venkatappayya and others had purchased the property in question from Venkataraman-

ayya, they (the vendees) filed a petition on 26th August 1918 under O. 21, R. 58, Civil P. C., to raise the attachment on the ground that there was no valid attachment on the properties on the date of their purchase. The decree-holder contested the position with the result that the petition was dismissed on 31st October 1919. The vendees (Gadiraju people) filed O. S. No. 142 of 1920 purporting to be under O. 21, R. 63, Civil P. C., for setting aside the order passed on 31st October 1919, and they made the decree-holder in O. S. No. 38 of 1912 as defendant 1 to their suit and Kameswaramma (the widow of the judgment-debtor in O. S. No. 38 of 1912) was made defendant 2. Various contentions were raised by the parties such as, for example, whether there was a valid attachment of the properties; whether the question was res judicata by reason of the order passed by the High Court on 18th December 1917; whether the plaintiffs were estopped from questioning the attachment; and whether the suit was barred by S. 47, Civil P. C. Both the lower Courts having dismissed the suit, the plaintiffs (Gadiraju people) preferred a second appeal to the High Court. The learned Judge who heard the second appeal was of opinion that on the facts disclosed by evidence in the present case there was no legal and valid attachment on the properties; that the plaintiffs who were not parties to the proceedings that came before the High Court in connexion with the execution of the decree in O. S. No. 38 of 1912 were not bound by the orders passed therein; and that it was open to the plaintiffs to show that there was no valid attachment on the property when they purchased the same on 27th May 1914.

The learned Judge came to the conclusion that after the ad interim stay order passed by the appellate Court on 13th March 1914 was received in the District Munsif's Court on 16th March 1914, no proceedings in execution could be legally taken in the case; and that the attachment which was effected by affixing a notice on the properties on 17th March 1914, and on the Court-house and the Collector's office on the 23rd March, was not merely irregular but illegal and void. Holding that the plaintiffs were not bound by the orders passed against their vendor—the judgment-debtor—after

(1) [1918] 41 Mad. 151=48 I. C. 214.

the judgment-debtor had sold the properties to them, the learned Judge reversed the judgments of both the lower Courts and set aside the order passed in the claim petition on 31st October 1919.

Defendant 1 has preferred this Letters Patent appeal.

Though several points were sought to be raised before us by the learned counsel on either side, we thought it advisable to restrict arguments in the first instance to the issue whether the main question has become *res judicata* by reason of the order passed by the High Court on 18th December 1917, and whether the plaintiffs are bound by the said order. After hearing full arguments on that question, we have come to the conclusion that the plaintiffs are so bound, and that it is not necessary to consider the other points raised in the case.

Venkataramanayya, the judgment-debtor in O. S. No. 38 of 1912, must be taken to have had full knowledge of all the proceedings that took place in execution of the decree in that suit; and pending the disposal of the appeal he got an ad interim order of stay of execution on 13th March 1914. The further proceedings that took place in the District Munsif's Court in connexion with the attachment proceedings also must have been known to him, viz., that the amin reported on 17th March 1914 that he had in pursuance of the order passed by the District Munsif on 14th March 1914 carried out attachment by affixing a copy of the proclamation on the lands on 17th March 1914, and that similar copies were affixed to the notice board in the Court-house and in the Collector's office on 23rd April 1914, though the stay order passed by the appellate Court was received in the District Munsif's Court on 16th March 1914. All this is not denied. He also knew that the said ad interim stay order was vacated on 15th April 1914 by the appellate Court as he had failed to furnish security as directed by that Court. It is in these circumstances that he sold the property to the Gadiraju people on 27th May 1914. What the exact effect of the proceedings that had taken place in the District Munsif's Court would be, in the circumstances, is a matter essentially relating to the execution of the decree in O. S. No. 38 of 1912. The judgment-debtor would be bound by the decision of

the executing Court as regards the effect of those proceedings, and *prima facie* any person who claims title under the judgment-debtor after the happening of those events would also be bound by the decision of the executing Court as to the exact effect of those proceedings. The judgment-debtor could not, by transferring the property at that stage, render the decision that may be, and in ordinary circumstances would be, passed by the executing Court as regards the effect of those past events, nugatory as far as the decree-holder is concerned. On the other hand the purchaser from the judgment-debtor in such circumstances would *prima facie* take the property only subject to the disabilities they were under when in the hands of the judgment-debtor. When therefore the decree-holder sought to proceed further with his execution application which he had already filed in March 1914, and wanted to bring the property to sale in pursuance of the steps taken by him in March 1914, the executing Court had to decide whether there was a valid attachment of the properties in March 1914.

The circumstance that the Court was called upon to decide that question formally only after the judgment-debtor had sold the properties to the plaintiffs should not alter the essential nature of the said proceedings, nor take away the jurisdiction of the Court in which the said execution proceedings were then pending to adjudicate on that question; nor is it material that the question came up for consideration on a petition filed by the judgment-debtor. It is clear from that petition (C. M. P. No. 1950 of 1914) that the decree-holder in O. S. No. 38 of 1912 had applied for sale in pursuance of the attachment effected in March 1914. The Courts had accordingly to consider what exactly would be the effect of the proceedings that had taken place in March 1914, and the High Court on 18th December 1917 passed final orders on that question in the following terms:

"The appeal will be allowed, the respondent's petition dismissed, and the attachment restored."

The judgment-debtor's widow was a party to the said proceedings in the High Court, and she could not therefore contest the binding nature of the said decision; but are the present plaintiffs (the vendees from the judgment-debtor under

a sale deed dated in May 1914) in a better position?

We were not referred to any reported decision directly bearing on the point.

After consideration of the question we have come to the conclusion that they are not.

In our opinion, when proceedings by way of attachment of immovable property in execution of a money decree have been taken by the executing Court in an execution application filed by the decree-holder, any question that might be raised whether the proceedings taken by the Court did amount to a valid attachment or not, is one that falls to be decided by the Court in the execution department; any stranger purchasing the property from the judgment-debtor in those circumstances would only take the property subject to the Court's decision as to the effect of the proceedings actually taken before his purchase. Such purchaser would be bound by the Court's decision of the question in the execution department, though he was not party to the same. To hold otherwise would be to impair the rights of the decree-holder and to enable the judgment debtor to set at naught decisions of Courts competent to adjudicate on the rights of parties, and give the go-by to the principle of law giving finality to decisions of Courts in matters properly before them.

The present is not a case where the proceedings pending before the Court is only an execution application to attach property. Further proceedings by way of actual attachment had taken place, and the proceedings by way of attachment of the properties in dispute took place in a Court of competent jurisdiction; it was when those proceedings were pending that the present plaintiffs purchased those properties from the judgment-debtor; *prima facie* they must be taken to have purchased it subject to the result of those proceedings. The principle of the doctrine of *lis pendens* would apply to such a case. If for any reason the proceedings that were had relating to the properties in question prior to the plaintiff's purchase should prove abortive and infructuous, and the decree-holder had to take entirely fresh execution proceedings after the plaintiff's purchase, then there would be force in the respondents' contention that such

fresh execution proceedings would not be binding on them unless they were made parties to the same. On the other hand, it is not open to a party to a proceeding to nullify the effect of proceedings already properly taken with reference to that property by transferring the same to strangers. As already remarked it does not really matter whether the actual decisions of the Courts as to the effect of the past proceedings is given only after the plaintiff's purchase if the adjudication is really with reference to matters that happened before such purchase and regarding the effect of the legal proceedings that were had prior to the same. To safeguard the purchasers' rights, the purchasers should in such circumstances get themselves impleaded as parties.

To take an analogous case: in a suit to recover money, if questions should arise whether the plaint contained sufficient allegations claiming and justifying a charge and whether the prayer claiming a charge on certain properties was specific or not, the trial Court would have to decide those questions by its final judgment and decree, and if the Court should decide the questions in favour of the plaintiff and give him a decree for money charged on the properties mentioned, it would seem that the decision would be binding on a purchaser from the defendant pending suit, though he be not actually a party to the decree. He would not be allowed to show in a subsequent suit that the prior decision was wrong in the absence of fraud or collusion. The case might be different if the plaint was subsequently amended so as to claim a charge on a particular property, after that property had been sold away by the defendant to a stranger.

In the case before us it is not contended (not even suggested) that the proceedings conducted by the judgment-debtor were not conducted bona fide or that there was any fraud or collusion between the judgment-debtor and the decree-holder in connexion with the same. On the other hand it is admitted by one of the present plaintiffs, when examined as a witness in the present suit, that he was really conducting those proceedings on behalf of the judgment-debtor's representative, the widow. After the sale of the suit properties to the plaintiffs on 27th May 1914, it is difficult to under-

stand why the judgment-debtor should have troubled himself, and why a petition, C. M. P. No. 1950 of 1914—should have been filed on 6th October 1914 to “cancel the attachment and the sale application made by the decree-holder.” As remarked by the lower appellate Court:

“It seems difficult to avoid the inference that the plaintiffs having been worsted in their attempt to get the attachment set aside by proceedings in the name of Venkataramanayya have hit upon the expedient of claim petition and the suit to achieve the same object.”

It was further argued that the attachment made in March 1914 should be taken to have been completed only on 23rd March 1914, when copies of the proclamation were affixed in the Court house and in the Collector's Office in accordance with the provisions of O. 21, R. 54, Civil P. C., and as the stay order was perused by the District Munsif on 17th March 1914, the subsequent acts done on 23rd March 1914 should be taken to be *ultra vires* and that there was no complete and valid attachment in the eye of the law; and the decision of the Full Bench in *Sinnappan v. Arunachalampillai* (2) was relied on. Assuming the argument to be correct, that does not take away the binding nature of the decision passed by this Court on 18th December 1917, that the attachment was valid, and restoring the attachment.

Orders passed in the course of execution proceedings adjudicating on the rights of the parties are *res judicata* and could not be called in question by the parties or their representatives. When once the said orders become final that effect could not be sought to be avoided by making allegations that previous decisions were wrong on the merits because the full facts were not placed before the Court or that all available evidence was not let in on the former occasions: see *Ram Kripal v. Rup Kuari* (3), *Mangal Parshad Dichit v. Grija Kant Lahiri* (4), *Rajah of Ramnad v. Velusami Tevar* (5).

It therefore seems to us that the present plaintiffs are bound by the orders passed by the High Court restoring attachment.

It is a matter for satisfaction that we have been able to reach this result, since

there is no doubt that the conduct of the judgment-debtor in setting an interim stay from the appellate Court (which was finally dismissed as no security was furnished) and then transferring the properties to the plaintiffs who had (there is no doubt) notice of all the proceedings—thus defeating the decree-holder would surely be reprehensible from the moral point of view.

We accordingly hold that the present plaintiffs are bound by the final orders passed in execution proceedings in C. S. No. 38 of 1912 in which it was held by the High Court in effect that there was a valid attachment in March 1914 of the properties in dispute, and that the said “attachment should be restored.” The plaintiff's purchase from the judgment-debtor in May 1914 should be taken to be subject to that attachment. Allowing this Letters Patent Appeal, we restore the decision of the lower appellate Court with costs here and in second appeal.

P.R.S./K.N.

Appeal allowed.

A. I. R. 1932 Madras 90

WALLER AND PANDALAI, JJ.

K. Tulsiram—Plaintiff—Appellant.

v.

Chairman, Municipal Council, Madura
—Defendant—Respondent.

Second Appeal No. 213 of 1929, Decided on 19th August 1931, against decree of District Judge, Madura, in A. S. No. 80 of 1928.

(a) **Madras District Municipalities Act (5 of 1920), Sch. 4, Rules—Rules not providing for extraordinary audit or reopening of audit—Such audit is illegal.**

Rules 56 to 58 as regards the auditing of account in the District Municipalities Act provide for one recurring audit only as the result of which defaulters can be charged or surcharged and do not provide for extraordinary audit or reopening of audits when once they have been closed and such audits and the surcharge certificate granted in pursuance thereof are without any legal validity whatsoever. (*English law discussed*). [P 92 C 1]

(b) **Interpretation of Statutes—Statutory provisions giving jurisdiction to inferior Courts, to Government Departments or to bodies created ad hoc must be strictly construed.**

Statutory provisions giving jurisdiction to inferior Courts, to Government Departments or to bodies created ad hoc must be strictly construed and the procedure prescribed must be exactly followed. Where public officers acting under colour of the statutory authority either decline to exercise or act beyond the authority given, it will not be held in the absence of clear language that the legislature intended

(2) [1919] 42 Mad. 844=53 I. C. 207 (F. B.).

(3) [1884] 6 All. 269=11 I. A. 37 (P. C.).

(4) [1882] 8 Cal. 151=8 I. A. 123=4 Sar. 248 (P. C.).

(5) A. I. R. 1921 P. C. 23=59 I. C. 880=48 I. A. 45 (P. C.).

to destroy the ordinary right of His Majesty's subjects to seek remedy in the Courts and to place them at the mercy of irresponsible tribunals or irresponsible State departments: *Rex v. Board of Education*, (1910) 2 K. B. 165 and *Board of Education v. Rice*, (1911) A. C. 179, *Rel. on.* [P 95 C 1]

(c) Madras District Municipalities Act (5 of 1920) Sch. 4, Rr. 56, 57, 58 and 61—Audit and surcharge in pursuance thereof both ultra vires—Suit by defaulter against surcharge is not barred—Election by defaulter to appeal against surcharge does not bind him and estop him from instituting suit.

Where an audit in pursuance of which a surcharge certificate is made on a defaulter is not one contemplated by the rules in Sch. 4, and consequently both the audit and the surcharge certificate are ultra vires a suit by the defaulter for an injunction restraining the Municipality from recovering the surcharge from him is competent and is not affected by the remedies provided by those rules even if those remedies be held to be substituted for the ordinary remedy by suit in cases governed by the rules.

The mere fact that the defaulter appeals to the Government against the surcharge and that the Government reduces the amount of surcharge does not bind him by an election to submit to an illegality and estop him from seeking justice in the Court to the extent to which the surcharge is confirmed: *A. I. R. 1914 Bom. 38*; *23 Cal. 775* and *43 Bom. 221, Ref.*; *12 Mad. 105*; *A. I. R. 1926 Mad. 297* and *A. I. R. 1928 Lah. 562, Dist.*; (*Case law discussed.*) [P 95 C 1]

F. S. Vaz—for Appellant.

P. Venkataramana Rao and *R. Alwar Naidu*—for Respondents.

Judgment.—The appellant in this case was Chairman of the Madura Municipality from 11th June 1921 till 25th June 1923. He was succeeded by Hajee B. Syed Shamsuddin Bahadur, whose term of office lasted till 1st July 1923, when he, in his turn, was succeeded by the defendant in the suit Mr. R. S. Naidu. The rules framed under the District Municipalities Act provide for periodical auditing of Municipal accounts and the Government have prescribed that there shall be an audit every half-year. During the appellant's term of office such audits were regularly made. In 1924, when Mr. R. S. Naidu was Chairman, it was discovered that extensive frauds had been going on in the street-lighting department of the Municipality and a supplemental audit was made of the accounts of the period from 1st April 1921 till 18th January 1924. It was ascertained that owing to the negligence of successive Chairmen a large sum of money had been misappropriated and

the auditor surcharged the appellant, his immediate predecessor and his two successors. In the case of the appellant and of Mr. R. S. Naidu, the surcharges were large, Rs. 7,000 odd and Rs. 6,000 odd, respectively. The rules in Sch. 4 of the Act allow to persons surcharged in this way either of two remedies. They may apply to the District Court to set aside the surcharges or "in lieu of such application" may appeal to the Local Government. All four of the aggrieved persons chose the latter course. Three of them succeeded in getting their surcharges remitted completely.

The appellant did not; all that he obtained was a reduction to Rs. 2,500. He then filed a suit in order to get an injunction restraining Mr. R. S. Naidu from recovering this sum from him under R. 62. The two main questions raised by it were these: whether the auditor had jurisdiction to reopen audits already closed and whether the plaintiff had any right to sue. The Sub-Judge found on issue 1 in favour of the appellant. The District Judge, though with some hesitation, dissented from his finding and held that there was nothing in the rules that prevented an audit being reopened. That was not quite the right method of approaching the problem. The question was rather whether there was anything in the rules that allowed the reopening of a closed audit. If the rules prescribe a half-yearly audit and nothing more whence is derived the power to re-open that audit to conduct an extraordinary or supplemental audit and as a result to make surcharges? Certainly not from anything in the rules themselves. On issue 2 the Sub-Judge and the District Judge again disagreed. The former considered that the appellant had a right of suit. The latter was of a different opinion. Both seem to have thought (and there was nothing in the plaint to disabuse them of that idea) that the suit was brought under R. 61. If that had been so, the Sub-Judge was quite wrong in holding that the remedies allowed by the rule were not mutually exclusive. It is quite plain that, if an aggrieved person has resorted to one, he cannot have the benefit of the other as well. Mr. Vaz now points out that this is a regular suit and not an

application under S. 61, which is not a suit at all and would have had to be presented to the District Court. His case is that all that was done was without any legal foundation and that his client has therefore a right to sue. He concedes of course that had there been any jurisdiction to conduct an extraordinary audit his right to sue would have been barred by the special remedies provided by the statute.

We will now deal with the first question whether there was any jurisdiction to conduct a supplementary audit. The relevant rules are Rr. 56 to 58, Sch. 4, District Municipalities Act. R. 56 directs the Chairman to submit to the auditor such accounts as he needs. R. 57 empowers the auditor to summon documents and persons and to question such persons. R. 58 (a) requires the auditor to report irregularities in expenditure or collection of money to the council. Under sub-R. (b) he must keep the council informed of the progress of the audit. By sub-R. (c) he is instructed to report to the council any loss or waste of money caused by neglect or misconduct with the names of the persons directly or indirectly responsible. Sub-R. (d) runs (the auditor shall)

"submit to the council a final statement of the audit and a duplicate copy thereof to the Local Government within a period of three months from the end of the financial year or within such period as the Local Government may notify."

And the Local Government have notified that the audit is to be made half-yearly. The District Judge thought that, as sub-R. (c) contained no time limit, the auditor was under an obligation to report financial irregularities to the council, whenever he discovered them. We do not agree that sub-R. (c) can be isolated in this manner from the rest of the rule. It must be that the report referred to is one arising out of and based on the audit prescribed by sub-R. (d). Similarly Rr. 56 and 57 appear to be designed for the purpose of that audit and no other. By R. 58 (a) the auditor must report what he has observed obviously, what he has observed in the course of that audit. Sub-R. (b) also must refer to that audit and to no other. The rules then in our judgment provide for one recurring audit only, as the result of which defaulters can be charged or surcharged. They do not provide for extra-

ordinary audits or the reopening of audits when once they have been closed.

As the rules are obviously framed on English precedents, it may be noted that, at one time and, in the case of one statute, up till a quite recent date, the position was the same. The statutes provided for periodical audits, but said nothing about any other. And it was held that there was no jurisdiction to reopen audits that had been completed. There is a case under the Poor Law Act that dates back to 1862, *Reg v. The Inhabitants of Chiddinstone* (1). An attempt was made to force a Poor Law auditor to reopen the audits of the six previous years. He refused on the ground that he was *functus officio* in respect of those audits and had no power to reopen accounts that had been examined, audited and closed. A writ of certiorari was issued, but the Court held that his refusal was legally correct. Four years later, in 1866, the Poor Law Amendment Act empowered the Poor Law Board to require an auditor to hold an extraordinary audit, which was to be deemed to be an audit

"within the meaning of the several Acts relating to the audit of the accounts of the poor rate."

Section 247, Public Health Act, 1875 prescribed in its original form an annual audit of the accounts of certain authorities. It is divided into ten subsections which, in many respects, resemble and may well have served as a model for the relevant rules in Sch. 4, District Municipalities Act. The commentators on the Act point out that there is no provision in the section as in the Poor Law Amendment Act of 1866, for holding an extraordinary audit and state that the Local Government Board consistently refused to allow such an audit. This state of affairs lasted till 1922, when an Act was passed giving the Minister of Health the power of ordering an extraordinary audit to be held. The view therefore in England has always been that if an act, which prescribes the holding of periodical audits, omits to give power to direct the holding of an extraordinary audit, an account which has been audited and closed at one of the periodical audits cannot be reopened. In this view, we cannot avoid the conclusion that in this case, there being no power reserved

(1) [1862] 26 Justice of the Peace 246.

by the rules in Sch. 4 to reopen audited accounts, the extraordinary audit and the surcharge certificate were without any legal validity whatever. Even apart from the English precedents, the matter seems plain enough. On the face of them, the rules provide for one audit only, the periodical one and it is quite impossible to read into them a power to hold any other kind of audit or to reopen a closed account. The appellant therefore succeeds on the first point.

On the second point the respondent contends that the suit is incompetent (1) because the ordinary remedy by suit must be deemed to have been taken away by the substitution of the special remedies provided by R. 61, Sch. 4 and (2), because the plaintiff having elected to appeal to Government against the surcharge as if it came within R. 61, and partially succeeded thereby cannot now repudiate that election and sue to have the decision obtained by himself set aside.

To succeed on the first branch of this contention it must be shown not merely on a proper construction the provisions in Sch. 4 as to surcharge and the remedies open to those aggrieved by a surcharge by an auditor acting within the rules are, so to say, a code in themselves intended to exclude the ordinary mode of redress by suit; but also that the same result holds in a case like the present where the auditor being authorized to issue surcharge notices only on the audit mentioned in the rules conducts an audit outside the rules and in fact the surcharge certificate is not a certificate within the rules at all but ultra vires of them. The decisions in *Secy. of State v. Major Hughes* (2), *Bajinath v. Ramgut Singh* (3) and *Ganesh Mahadar v. Secy. of State* (4) are illustrations of the distinction between the two classes of cases. In the first case the Cantonment Magistrate of Poona acting under rules made by Government under the Cantonment Act, which enabled him to assess lands and buildings in the cantonment to a tax based on their annual value from which assessment an appeal lay to the Cantonment Committee whose decision was final, assessed the lands and buildings held by the Western India Turf Club not on the annual value of

the properties but on the total gross income of the club which resulted in the assessment being enhanced from Rs. 200 to about Rs. 9,400 per year. An appeal to the Cantonment Committee was unsuccessful and so the assessment became final under the rules. When the suit was brought for recovery of the excess sums wrongly levied on the ground that the Magistrate was not acting within the rules it was never questioned that if the Magistrate's action were ultra vires any objection to the suit could be raised and the only point suggested was that applying a wrong basis for assessment is not acting ultra vires. But the contrary was held. The High Court observed that the regulations had not been in substance or effect complied with, that the money had been claimed and received without a shadow of a right and that according to an earlier decision *Kesandas v. Ankleswar Municipality* (5), the case was one in which the jurisdiction of the Court was not ousted. In the case in *Kesandas v. Ankleswar Municipality* (5) in which the plaintiff failed Sir L. Jenkins said:

"Had the appellant-plaintiff been able to make out that which is the basis of his argument that the prescribed rules for arriving at a valuation had not been observed, then I agree he would have successfully distinguished this case: *Morar v. Borsad* (6)."

The decision of the Privy Council in *Bajinath Sahri v. Ramgut Singh* (3), turned on the effect of not observing the essential procedure laid down for enforcement of a demand under the Public Demands Recovery Act. The Collector had sold the defaulter's property without there being in existence a certificate which was declared by the Act to have the force of a decree and which alone would have authorized the sale. The attempt was made in argument to show that the omission was immaterial and had been condoned. The High Court said (p. 779) that the Act was framed with the intention as far as possible to exclude proceedings duly taken under it from being reviewed in Courts of Justice. The safeguards provided by the Act for the exercise of those powers may or may not be sufficient to prevent those powers being sometimes used harshly and improperly; but, such as they are, they must be strictly enforced, and the form of procedure laid down in the Act must be strictly

(2) A. I. R. 1914 Bom. 33=23 I. C. 779.

(3) [1896] 23 Cal. 775=23 I. A. 45 (P.C.).

(4) [1919] 43 Bom. 221=49 I. C. 427.

(5) [1902] 26 Bom. 294=3 Bom. L. R. 882.

(6) [1900] 24 Bom. 607=2 Bom. L. R. 417.

followed. Their Lordships of the Privy Council endorsed this by remarking that the provision that a certificate is to have the force and effect of a decree is a very stringent provision and that it is unnecessary for them to point out the necessity there is when power is given to a Public Officer to sell the property of any of His Majesty's subjects that the forms required by the Act which are matters of substance should be complied with. In *Ganesh Bahadar v. Secy. of State* (4), a suit to recover silver seized and the penalty imposed by the Customs Collector was held maintainable notwithstanding S. 188, Sea Customs Act, which declares adjudication by the Customs authorities final. The ground of decision was that there had been in fact no adjudication by the Collector after himself hearing the evidence and giving the plaintiff an opportunity of being heard. In the present case the auditor's surcharge certificate, if validly given under the rules, can be enforced as a decree, and it is idle to suggest that that force and effect is to be given to a so-called certificate given on an audit unauthorized by the rules, and further to suggest that the aggrieved party has no other remedy against this illegal demand being enforced against him under the summary procedure of certification except that provided by the rules which were framed for an entirely different purpose.

The cases cited by the learned Government Pleader for the respondent were all cases of public authorities or officers acting within their powers though irregularly, and there was no question of ultra vires in them. Indeed in *Wake v. Mayor of Sheffield* (7), the Master of the Rolls pointed out the difference and founded his decision on it. The case in *Ramachandra v. Secy. of State* (8) was one in which the forest officer decided that a certain area of forest land was not part of the plaintiff's property and the plaintiff, after appealing unsuccessfully to the District Judge under the Forest Act, brought a separate suit to set aside that decision. It was held the suit did not lie. Similarly in *Muhammad Raza Saheb Belgami v. Sadasiva Rao* (9), the Examiner of Local Fund Accounts,

acting as auditor under the rules now in question surcharged the Chairman of the Guntur Municipality for making payments out of the Municipal Fund which were illegal because they were made in contravention of a Government order made under R. 37, Sch. 4. The Chairman having applied unsuccessfully under R. 61 to the District Judge to remit the surcharge, a revision petition to the High Court was dismissed, the Court upholding the decision of the District Judge on the merits. An application to the Court for a writ of certiorari was in those circumstances also dismissed, both learned Judges observing that a substituted remedy was provided by the Act, and that even if the general power of issuing the writ in those circumstances were held not to be taken away, the writ would not issue where other and equally efficacious remedies exist for redress of grievances complained of. It is clear that the Court was not dealing with a case of surcharge ultra vires of the District Municipalities Act. The case in *Dewa v. Fazal Dad* (10), was of an absconding accused against whom proceedings under Ss. 87 and 88, Criminal P. C., were taken and his property was sold and purchased by a stranger. After his arrest and trial in which he was acquitted he applied to the criminal Courts for restoration of the property and it was held on the criminal side up to the High Court that under S. 89 only the net sale proceeds could be restored but not the property. The absconder then brought a civil suit against the purchaser and it was held that the suit did not lie. It was not denied for the plaintiff that the Magistrate had jurisdiction to take proceedings under Ss. 87 and 88 and that the civil Court would have no jurisdiction to entertain a suit of the kind if the sale had been properly carried out. But it was urged that there were irregularities in the proclamation fixing a date for the absconder's appearance and that no warrant of attachment had been issued. These irregularities notwithstanding, the suit was held not maintainable. Here again there was no question of ultra vires and the authority concerned was a Court from whose acts the Criminal Procedure Code prescribes resort to higher tribunals for redress. In the case in *Pite Ram v. Jhujhar*

(7) [1884] 12 Q. B. D. 142.

(8) [1889] 12 Mad. 105.

(9) A. I. R. 1926 Mad. 297=92 I. C. 918=49 Mad. 49.

(10) A. I. R. 1928 Lah. 562=111 I. C. 508=10 Lah. 338.

Singh (11), a claimant to property seized by a Receiver in insolvency proceedings having urged his claim in the Insolvency Court and failed to institute a civil suit urging the same claim. That was a case which could have been decided on the ground of *res judicata* without going into the several matters urged before the Court and discussed in the judgment. Statutory provisions giving jurisdiction to inferior Courts, to Government Departments, or to bodies created *ad hoc* must be strictly construed and the procedure prescribed must be exactly followed. Where Public Officers acting under colour of the statutory authority either decline to exercise or act beyond the authority given, it will not be held in the absence of clear language that the legislature intended to destroy the ordinary right of His Majesty's subjects to seek remedy in the Courts and to place them at the mercy of irresponsible tribunals or irresponsible State departments: see *Rex v. Board of Education* (12) affirmed in *Board of Education v. Rice* (13), and cases cited in *Halsbury Vol. 27, p. 190, foot-note (g)*. The result is that the audit in pursuance of which the surcharge on plaintiff was made not being one contemplated by the rules in Sch. 4, the plaintiff's suit is not affected by the remedies provided by those rules even if those remedies be held to be substituted for the ordinary remedy by suit in cases governed by the rules.

The second branch of the respondent's contention is equally fallacious for the reasons already indicated. The plaintiff's assumption that he was entitled to appeal to the Local Government against the surcharge in this case cannot bind him by an election to submit to an illegality. Nor can the fact that the Government were pleased to reduce the amount of this surcharge estop him from seeking justice in the Courts to the extent to which the surcharge was confirmed. In the result the decree of the lower appellate Court must be reversed and that of the Subordinate Judge restored with costs in this and the lower appellate Court.

P.R.S./R.M.

Order accordingly.

* * A. I. R. 1932 Madras 95

WALLER AND PANDALAI, JJ.

Sivasami Odayar—Defendant—Appellant.

v.

C. R. Subramania Aiyar—Plaintiff—Respondent.

Second Appeal No. 334 of 1927, Decided on 18th August 1931.

* * (a) Provincial Insolvency Act (1920), S. 52—S. 52 is peremptory in its terms—Receiver referred to in S. 52 is interim receiver—Application under S. 52 by interim receiver is competent.

Section 52 as amended is peremptory in its terms and contemplates the presentation of an application not after adjudication but at an earlier stage, i.e., after an insolvency petition has been admitted. At that stage the only receiver that can be in existence for the purpose of applying is the interim receiver. The Receiver referred to in S. 52 is not the receiver appointed after adjudication and an application under S. 52 by an interim receiver is competent.

Where therefore an interim receiver moves the Court under S. 52 to adjourn a sale in execution of a decree against the insolvent, the executing Court must stay the sale and direct delivery of the property to the interim receiver and an Official Receiver subsequently appointed is justified in declining to recognize the title of the auction-purchaser under such a sale: *A.I.R. 1926 Mad. 432, Diss. from*; *A.I.R. 1928 Bom. 177, Ref.* [P 96 C 1]

(b) Provincial Insolvency Act (1920), S. 52—Applicability.

Section 52 applies to all kinds of properties under attachment by a Court: *A.I.R. 1929 Cal. 524, Foll.* [P 96 C 2]

T. M. Krishnaswami Ayyar and *C. A. Seshagiri Sastri*—for Appellant.

B. Sitarama Rao, K. R. Rangaswami Ayyangar and *S. Ranga Raja Ayyangar*—for Respondent.

Judgment.—The appellant in this case is a person who took a lease of an insolvent's land from an Official Receiver. The respondent purchased the land in execution of a decree passed against the insolvent and his sons and he sued to recover the value of the crops removed from it by the appellant. The facts and dates are these. The land was attached in execution and proclaimed for sale, the sale being fixed for 30th September 1920. On the 23rd the insolvent applied to be adjudicated and on the 28th the Official Receiver was appointed interim receiver. Two days later he moved the Court under S. 52, Provl. Insol. Act to adjourn the sale. He did not, in terms, ask for possession of the land to be delivered to him, but, as he wanted the sale to be adjourned so that he himself might sell, such a request on his part.

(11) [1917] 33 I. C. 798.

(12) [1910] 2 K. B. 165=79 L. J. K. B. 595=102 L. T. 578=74 J. P. 259=8 L. G. R. 549=26 T. L. R. 422.

(13) [1911] A. C. 179=80 L. J. K. B. 796=104 L. T. 639=75 J. P. 393=9 L. G. R. 652=55 S. J. 440=27 T. L. R. 878.

may be implied. The Court refused the adjournment and the sale was conducted. On 23rd October the receiver asked the Court not to confirm the sale, but his prayer was again refused. On 15th December the insolvent was adjudicated and the Official Receiver proceeded to lease his land to the appellant, after which the respondent obtained symbolical delivery from the Court. The Official Receiver subsequently applied to have the sale set aside. His application was rejected by the executing Court, but was allowed by the District Judge, whose order was however set aside by the High Court in a decision which is reported in *Subramania Ayyar v. Official Receiver, Tanjore* (1). The Court held that the receiver referred to in S. 52, Provl. Insol. Act was the receiver appointed after adjudication and that no application under that section on the part of an interim receiver would lie. With great respect we must express our dissent from this view. S. 52, as now amended, contemplates the presentation of an application, not, as it used to do, after adjudication, but at an earlier stage—that is to say, after an insolvency petition has been admitted. At that stage, the only receiver that can be in existence for the purpose of applying is an interim receiver. In a case reported in *Mahasukh v. Valibhai* (2) an application had been presented under S. 52 by an interim receiver and no one seems even to have argued that it was not maintainable for the reason that no interim receiver could apply. The truth is that S. 52, in its present form, is entirely out of place under the heading:

“Effect of insolvency (in other words of adjudication) on antecedent transactions.”

Before amendment, it came properly under that heading. Now it is concerned with applications presented at an earlier stage. Mr. Sitarama Rao seeks to support the High Court's order on another ground that S. 52 does not apply to immovable property, which cannot be said to be “in the possession of the Court.” Were the matter *res integra*, we should be inclined to accept his argument. In India land is attached not by seizure, but by means of a prohibitory order and it is difficult to understand how, while it

remains in the physical possession of the judgment-debtor or of a third party, it can be said also to be in the possession of the Court. There is however plenty of authority, for example *Haranchandra Chakravarthi v. Jay Chand* (3), for the view that the section applies to all kinds of property under attachment by a Court and we do not propose to dissent from it. The result, then, is that, on the application of the interim receiver, the executing Court should at once have stayed the sale and directed delivery of possession to him, the section being peremptory in its terms. The sale, has however been confirmed by a Bench of this Court and, even if it could be set aside, no one is asking for it to be set aside. But it is important to define the true legal position, which has some bearing on the appellant's plea of bona fides. It is not disputed that he paid rent to the Official Receiver or that he deposited part of it in Court under O. 21, R. 46. Under the circumstances, we do not consider that he should be asked to pay twice over. His payments to the Official Receiver seem to have been made bona fide and be valid under S. 150, T. P. Act. The Official Receiver was quite justified in declining to recognize the title of the auction-purchaser under a sale that should not have taken place or been confirmed by a Court, which was required peremptorily by the statute to stay its hand and to transfer the attached property to the receiver. As regards the deposit under O. 21, R. 46 the law allowed it and it can hardly be described as mala fide. The final argument is that the receiver was not entitled to possession of the sons' shares and that the plea of bona fides could not be sustained in regard to them. As to that, the law at that time was not settled and there was some doubt whether the sons' shares also did not vest in the receiver. Apart from that, it is clear that the auction-purchaser himself was not entitled to anything but symbolical possession. If he has a legal grievance at all, it is against the Official Receiver, who has received payment from his lessee.

We allow the second appeal and dismiss the suit with costs throughout.

P.R.S./R.M.

Appeal allowed.

(1) A.I.R. 1926 Mad. 432=93 I.C. 877.

(2) A.I.R. 1928 Bom. 177=109 I.C. 152.

(3) A.I.R. 1929 Cal. 524=123 I.C. 737=57 Cal. 122.

* A. I. R. 1932 Madras 97 (1)

REILLY AND ANANTAKRISHNA
AYYAR, JJ.Poova Nalingam Servai—Appellant.
v.

Veerayi and others—Respondents.

Letters Patent Appeal No. 8 of 1926, Decided on 8th December 1930, from decree of Phillips, J., D/- 17th August 1925, reported in *A. I. R. 1926 Mad. 186*.

* Partition—Justice, equity and good conscience—*A* paying part of *B*'s purchase money—Though it may not amount to charge, equity in *A*'s favour can be enforced by Court against *B* or *B*'s transferee with notice.

Where *A* has paid a part of the purchase money for *B*, the equity arising in *A*'s favour from his payment for *B* can properly be enforced by the Court against *B* or against *B*'s transferee with notice of such transaction, though the circumstances of this payment may not be those in which *A* can be subrogated to the vendor's charge: *A. I. R. 1926 Mad. 186*, *Affirmed*; *Swan v. Swan*, (1819) 8 Price 518 and *Leigh v. Dickson* (1885) 15 Q. B. 60, *Ref.*

[P 97 C 1]

A. V. Narayanaswami Ayyar—for Appellant.

K. V. Sesha Ayyangar—for Respondents.

Judgment.—Assuming that the circumstances of the payment of Rs. 140 out of the purchase money by defendant 1 for defendant 2, which are not fully disclosed by the record before us, are not those in which defendant 1 could be subrogated to any vendor's charge, this being a suit for partition, even without any charge the equity arising in defendant 1's favour from his payment for defendant 2 can properly be enforced by the Court: cf. *Swan v. Swan* (1) and *Leigh v. Dickson* (2). The plaintiff is a transferee from defendant 2 and is found to have had notice of this payment of Rs. 140 by defendant 1.

We see no sufficient reason to differ from the learned Judge's decision except that there does not appear to us to be any reason for allowing interest at a higher rate than 6 per cent. The interest allowed on the Rs. 140 in defendant 1's favour from 5th May 1914 to 22nd July 1918 will be reduced to that rate, amounting to Rs. 35-3-0. In other respects the appeal is dismissed. The appellant will pay respondent 1's costs.

P.R.S./B.V. Appeal dismissed.

(1) [1819] 8 Price 518=22 R. R. 770.

(2) [1885] 15 Q.B.D. 60=54 L.J.Q.B. 18=33 W.R. 538=52 L.T. 790.

A. I. R. 1932 Madras 97 (2)

CURGENVEN AND CORNISH, JJ.

Thiruvengadam Pillai and another—
Plaintiffs—Appellants.

v.

P. Gnanasambandam Pillai and others
—Defendants—Respondents.

Appeal No. 214 of 1929, Decided on 28th January 1931, against decree of Sub-Judge, Mayavaram, D/- 25th October 1928, in O. S. No. 10 of 1925.

(a) Hindu Law—Reversioner—Right to sue—Suit for declaration that alienation by widow is not binding, barred by time—Plaintiffs cannot be allowed to remove bar of limitation indirectly.

A party to a suit cannot be allowed to do indirectly what they cannot do directly.

Where the reversioners' right to sue for a declaration that a mortgage executed by a widow or a decree on it is not binding on them is barred by limitation, they cannot be allowed to remove the bar of limitation by opening the question of the binding character of the alienation and the decree on it by the argument that lapse of time will not make binding on the estate which was not binding before: 33 P. R. 1911; (1894) A. W. N. 137 and A. I. R. 1931 Mad. 274, *Foll.*

[P 98 C 2]

(b) Hindu Law—Alienation—Widow—Actual pressure at time of alienation and funds not available for discharge of husband's debts—Alienee making reasonable inquiry and believing bona fide that alienation is necessary is protected.

Although a widow is not bound to discharge her husband's debts out of the income of his estate but is bound to keep down the interest on her husband's debts and is only entitled to enjoy the net income from her husband's property an exception is recognized in favour of the alienee. If there was actual pressure at the time of the alienation and the widow had then no funds available for discharge of the debt or the alienee after reasonable inquiry bona fide believed that the alienation was necessary he will be protected: 18 I. C. 953 and 24 I. C. 534, *Rel. on.*

[P 99 C 1]

(c) Interest—Reasonableness—Conditions and terms of lending should be considered.

In deciding the question of the reasonableness of a particular rate of interest the whole condition and terms of lending must be considered: A. I. R. 1928 P. C. 64, *Rel. on.* [P 99 C 2]

S. Varadachariar and R. Rajagopala
Aiyangar—for Appellants.The Advocate-General, S. Jagadisa
Ayyar, S. Nagaraja Ayyar and N. Soma-
sundaram—for Respondents.

Judgment.—The plaintiffs are the appellants. They sued for a declaration that a mortgage (Ex. 1) executed by defendant 3, a Hindu widow, of her husband's lands in favour of defendant 1 was void as against them, the husband's reversionary heirs. The husband died in 1896. In 1897 the widow executed a

mortgage Ex. 6-f in favour of one Rangasami who was the father-in-law of defendant 2. This was for securing a loan of Rs. 2,000 and the instrument recites that the money was required to discharge debts due by her deceased husband. It appears that the widow later sold some plots of land from time to time and that the sale proceeds were used to reduce the amount of the mortgage debt due to Rangasami. Subsequently, the mortgagee's rights became vested in defendant 2, who brought a suit upon the mortgage against the widow. On 17th January 1913 defendant 2 obtained ex parte a preliminary decree for the recovery of Rs. 2,373-12-0 then due, together with interest at 9% per annum on Rs. 1,300, the balance of principal due from date of plaint to 17th July 1913, the date fixed for payment, and with further interest at 6% on the whole amount from 17th July 1913 until payment. It was for the purpose of discharging the decree amount, which by that time had swollen to Rs. 2,845, that on 9th September 1914 the widow executed Ex. 1, the suit mortgage in favour of defendant 3.

The plaintiffs impeach this mortgage upon two grounds. First, they say it is a fictitious transaction, part of a scheme of the widow and her mother-in-law to transfer the husband's lands to the family of defendant 2 in fraud of the reversionary heirs. We do not think that the evidence sustains this allegation. The plaint avers nothing more in support of it than that defendant 1 is a cousin of defendant 2's husband and was under obligations to Rangasami, defendant 2's father-in-law, who had looked after defendant 1 during his minority. The defendant 1 gave evidence at the trial and he has deposed that, in pursuance of his contract under Ex. 1 he did pay off the decree debt due to defendant 2; that he did not do this by a cash payment, but by adjusting this debt against a debt due by defendant 2 to him and his family. His story is corroborated by documentary evidence. Ex. 2 is a pro-note dated 8th April 1916 given by defendant 1 to defendant 2 for a loan of Rs. 8,600. Ex. 3 is a receipt, given on the same date by defendant 2 to defendant 1 for payment of Rs. 3,263-13-0, which is stated to be the principal and interest up to date in respect of the

amount due by defendant 3 under the mortgage decree. Defendant 2 has accepted the genuineness of her signature to this document, but she has no recollection of the circumstances in which she signed it, as she says her husband managed all business and money transactions. Ex. 2 bears an endorsement (Ex. 2-a) dated 11th February 1918 that the note had been discharged. A number of other documents Exs. 4, 5 and 8 support defendant 1's story that the mutual debts of defendant 1's and defendant 2's family were adjusted. The learned Subordinate Judge has discovered no reason for doubting the genuineness of these documents or of the transactions which they evidence. None is apparent to us. In fact, the evidence with regard to them is all one way.

The plaintiffs' second ground is that the mortgage Ex. 1 stands in no better position than the mortgage Ex. 6-f and that if it can be shown that the earlier mortgage and the decree upon it were attributable to the widow's improvidence in alienating property to pay debts which could and ought to have been discharged, from income in her hands, at least with regard to the interest, the reversioners would not be bound thereby. Two issues were framed in the lower Court, viz.:

(1) Was the mortgage, Ex. 6-f binding upon the husband's estate and (2) were the plaintiffs entitled to question the validity of the decree in respect of that mortgage.

It is indisputable that the plaintiff's right to sue for a declaration that the mortgage (Ex. 6-f) is not binding or that the decree is not binding would be barred by limitation. But the argument is that lapse of time will not make that binding on the estate which was not binding before. We think however that the learned Sub-Judge was right in striking out these issues. To allow the plaintiffs now to open the question of the binding character of the previous alienation and the decree upon it would, in effect, remove the bar which the Limitation Act has placed in their way. In other words, the plaintiffs cannot be allowed to do indirectly what they cannot do directly. That was the view expressed by a Full Bench of the Punjab Chief Court in *Khiali Ram v. Gulab Khan* (1), and we

(1) [1911] 33 P. R. 1911=11 I. C. 392 (F. B.)

agree with it. In that case, plaintiffs, reversioners of the husband sought to avoid the bar of limitation to a suit to declare the widow's alienation void, by showing that the mortgage executed by her husband (in discharge of which his widow had sold the property to the mortgagee) was a fictitious transaction; and it was ruled that they could not do this. The case reported in *Jaggi v. Prithi Pal* (2), proceeds on the same principle, and so too *Karri Adeyya v. Tammulamoddi Govindu* (3), decided by one of us.

The plaintiffs therefore have to fall back on their case that defendant 1 cannot be regarded as a bona fide lender. Their allegation is that connected as he was with the families of defendants 2 and 3 he must have been aware of the circumstance that led to the mortgage Ex. 1 and that the widow was allowing interest to accumulate without any effort to keep it down out of her income. The principle has been laid down that a widow is not bound to discharge her husband's debts out of the income of his estate; but that she is bound to keep down the interest on her husband's debts and is only entitled to enjoy the net income from her husband's property. But an exception is recognized in favour of the alienee. If there was actual pressure at the time of the alienation and the widow had then no funds available for the discharge of the debt, or the alienee, after reasonable inquiry, bona fide believed that the alienation was necessary, he will be protected: see *Boddu Jaggayya v. Goli Appala Raju* (4) and *S. Appalaswamy v. S. Venkanna* (5). In the present case it has been proved that the net income available to the widow from her husband's lands was about Rs. 200 per annum, and that the income had only become available from the date of the compromise of the widow's suit in January 1912. By this compromise she recovered the control and enjoyment of her husband's lands which since his death had hitherto been in the management of her mother-in-law. So that at the date when she executed the mortgage (Ex. 1) there was not more than between Rs. 600 to Rs. 700 at

the widow's disposal to meet a debt of Rs. 2,845 due under the decree. There is evidence, which has been accepted by the lower Court, that the widow was being pressed to discharge the debt, and it is apparent that if she did not, the property was liable to be brought to sale in execution of the decree. We think therefore that defendant 1's mortgage is justified.

Defendant 1 has filed cross objections to the reduction made by the learned Sub-Judge in the rate of interest fixed by the mortgage instrument. He has held that the provision for payment of compound interest at 12% per annum from 9th September 1916, with annual rests, is onerous and penal, and he has awarded interest at $\frac{3}{4}\%$ per mensem on the arrears of interest till 9th September 1916 and compound interest at the same rate with annual rests afterwards. The question of the reasonableness of a particular rate of interest was discussed by their Lordships of the Judicial Committee in *Sunder Mull v. Satya Kinder Sahana* (6). There it was stated that the whole conditions and terms of the lending must be considered together. The learned Sub-Judge has heard evidence as to the ordinary rate of interest in the locality, and he has taken into consideration the value of the security offered by the widow, which was ample, as well as the widow's need for money, which was pressing. In these circumstances we are not prepared to interfere in a matter to which the Sub-Judge has obviously given much care and which he was well fitted to decide.

We think however that the proper course is to declare in the decree that that portion of the debt comprising the disallowed interest is not binding on the estate and in other respects that the suit is dismissed.

With this modification the appeal and the cross-objections will be dismissed with costs.

R.M./R.K.

Order accordingly.

(6) A. I. R. 1928 P. C. 64=108 I. C. 537=55
I. A. 85=7 Pat. 294 (P. C.).

(2) [1894] A. W. N. 134.

(3) A. I. R. 1931 Mad. 274=131 I. C. 609.

(4) [1913] 18 I. C. 953.

(5) [1914] 24 I. C. 534.

A. I. R. 1932 Madras 100

CURGENVEN AND CORNISH, JJ.

M. K. Srinivasan and others—Plaintiffs—Appellants.

v.

Watrap S. Subramania Ayyar and others—Defendants—Respondents.

Second Appeal No. 90 of 1930, Decided on 29th January 1931, against decision of Waller, J., D/- 25th November 1930, in O. S. No. 491 of 1930.

Companies Act (1913), S. 21—Company meeting for election of certain Directors from shareholders—Chairman ordering poll on certain future day—Chairman absent and hence poll not taken—Co-option of Directors by remaining office-holding directors—This action ultra vires against Company's Articles of Memorandum—Some shareholders can sue to set aside this procedure and for order for new election.

There were two sets of directors in a certain company—policy-holders' directors and shareholders' directors. A general meeting of the Company was held for the election of the shareholders' directors. The chairman, after the proceedings of the day, ordered that a poll would be held at a certain place and time. But owing to the absence of the chairman and the polling officer the poll could not be held and the shareholders could not exercise their right of voting because afterwards the policy-holders' directors had co-opted certain shareholders' as the shareholders directors' to make up a required number of directors. Certain shareholders sued for a declaration that such co-option was illegal and ultra vires of the Articles of Memorandum of the company and for an order for a fresh poll.

Held: that under the said circumstances, and under the Articles of Memorandum of the Company such co-option of the shareholders' directors by the policy holders directors was ultra vires and illegal. That the plaintiff shareholders in the said circumstances had a right to file such a suit on behalf of all the shareholders. That under the Company's Articles, the taking of the poll was not a meeting of the Company, in the strict sense but was in law a continuation of the meeting at which the poll was directed to be taken. That the breakdown of the arrangement of the poll on the fixed date did not put an end to the taking of a poll, because there must be at least a reasonable opportunity to the voters and to the candidates of having the poll taken. The Chairman therefore should have appointed another date for the poll, because if a poll is demanded it must be taken even though the chairman refuses to grant the poll. That the Court had jurisdiction to entertain suit by shareholders against the Company in respect of the infringement of their rights as shareholders, e. g., the right of exercising their individual votes, when the interests of justice so required; (*Case law discussed*).

V. V. Srinivasa Ayyangar, K. Venkataraman, S. Parthasarathy and V. K. Thiruvengkatachari—for Appellants.

T. R. Venkatarama Sastriar, K. Narasimha Ayyangar, N. Rajagopala Ayyangar, K. S. Rajagopala Ayyangar, V. C. Gopalaratnam, V. Sankaram, U. Ramachandram and S. Panchapagesa Sastri—for Respondents.

Curgenvén, J.—The suit out of which this appeal arises relates to a company known as the United India Life Assurance Co., and the circumstances which gave rise to the dispute are briefly these. The directorate of the company is composed of two policy-holders Directors, elected by the policy holders and of a certain number of shareholders' Directors. The ordinary general meeting for the election of shareholders' Directors was fixed for 13th October 1930. The Articles of Association had contained a provision that the number of shareholders' Directors should be six, and that two should retire in rotation, their places being filled by election at the meeting. But this number had been by amendment of the Articles reduced to five and it was provided, as a 'special case, that at the general meeting of 1930 the six Directors should vacate office and that not more than five should be elected in place of them. At the meeting defendant 3, who was at the time the Chairman of Directors, took the chair, and, it being decided to fill all five vacancies, a vote was taken by show of hands, and five persons were declared elected. A poll was then demanded, and the Chairman directed that it should be held at the Company's office on Monday 20th October between the hours of 4 and 6 p. m. and appointed the Company's Manager, Mr. Church, Returning Officer for the purpose of taking it. In thus allowing a week to elapse before the poll was taken, the Chairman incurred the disapproval of plaintiff 1, one of the shareholders, who addressed to him on the 15th, a letter protesting against his action, and pointing out that, since all the shareholders' Directors had retired on the 13th, the shareholders must during the interval remain wholly unrepresented and the operation of the company come to standstill, because the two policy holders Directors were below the minimum number authorized to transact business. This letter was certainly

most provocative in tone and perhaps explains, though it may not justify what happened next. On the 16th the two policy holders' Directors appointed two other persons the chairman himself and defendant 4 thus bringing the number of Directors up to four, the minimum number required by Art. 88 to act in the name of the Company. It will be for consideration whether this action was within their powers. It evoked from plaintiff 1 another letter written the day before the date fixed for the poll, condemning this procedure and expressing the apprehension that advantage was intended to be taken of it to hold a poll only in respect of the three remaining vacancies. What happened whether by accident or design we are not now concerned to inquire—more than justified his misgivings. On 20th at the appointed time a number of shareholders assembled at the office of the Company, but neither did the Returning Officer appear nor were any other arrangements made for holding the poll. They waited there and eventually dispersed. The explanation given is that Mr. Church was unable to attend through sudden illness, and that a message which he sent to the Chairman in the course of the afternoon was not delivered as the Chairman had shortly before left Madras on a visit to a sick relative. No further attempt was made to take a poll, and indeed, whether rightly or wrongly, the four persons at that time claiming to be Directors defendants 1 to 4 two days later took the line best calculated to demonstrate their refusal to adopt that course by "co-opting three more directors, defendants 5 to 7, thereby bringing their number up to the maximum. The four plaintiffs, as shareholders, filed their suit on 24th October, praying inter alia that these appointments might be declared illegal and invalid and that the Court should direct a poll to be taken to elect five shareholders' Directors to the existing vacancies.

The learned Judge who tried the suit, Waller, J., has dismissed it upon a preliminary issue. He finds indeed that the co-operation, in two stages of the five shareholders' Directors was ultra vires but that, assuming it to have been so, the Company, and not individual shareholders, should have been the plaintiffs. Further, he considers that

the Articles of Association provided the shareholders with an alternative remedy and that at least until that had proved infructuous the Court should not intervene. All the plaintiffs appeal against this decision, which is supported in varying ways by the several defendants, whose points of view may be gathered from the contents of their written statements. Defendants 1 and 2 the two policy holders' Directors endeavour to justify their action in co-opting defendants 3 and 4 and then, with these defendants, co-opting defendants 5 to 7. The Chairman (defendant 3) contends that even if this procedure was not legal, those of the new Directors who were previously in office, all except defendant 4 may be deemed to have continued by virtue of the terms of Art. 68 (g). Defendant 4 the sole new comer to the office has, perhaps to give scope to this alternative, since resigned. Defendants 5 and 6 denounce the act of co-opting them as unlawful but claim to be still in office under Art. 68 (g).

It has become clear to me that the crucial questions of law upon the answer to which a correct decision depends in this case are, firstly, what determines the duration of an ordinary general meeting for the election of Directors and secondly, what is the nature of the process known as taking a poll. The rules governing these matters are not, I think, in any respect peculiar to this Company. Art. 37 gives the Directors power to fix the annual ordinary general meeting, and Art. 42 provides for the election of Directors at it. Such election is to be, in the first instance, by show of hands. If at least three members demand a poll the Chairman shall grant it. Art. 49 empowers the chairman to take it, and runs as follows:

"If a poll is demanded as aforesaid it shall be taken in such manner and at such time and place as the chairman of the meeting directs, and either at once or after an interval of adjournment, or otherwise, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded. The demand for a poll may be withdrawn."

Put shortly, the view pressed upon by Mr. T. R. Venkatrama Sastri on behalf of the respondents is that the process of holding the poll is a detached portion of the general meeting, or is at any rate a "meeting" within the mean-

ing of the Articles of Association and that when that "meeting" comes to an end, whether or not the poll has been taken, the general meeting also terminates, and there exists no power to revive it either on the part of the Chairman or of the Directors, and if for some reason the poll has not been taken, and no Directors elected there exists no further power to do these things. It will be at once evident — indeed, no better illustration is needed than the present case—how completely subversive these doctrines would be of the rights of election possessed by the shareholders. Fortunately they appear to be based upon fundamentally erroneous conceptions. The original meeting in law continues until the chairman has carried out the direction given to him by the shareholders to take a poll. It is a notional meeting not dependent for its existence and continuity upon the shareholders being actually in session and business being transacted. The actual process of holding the poll is not a "meeting" at all. It differs in several of its features from any meeting of shareholders. For example, the Articles provide that every such meeting shall be held at the office of the company whereas Art. 49, reproduced above, empowers the Chairman to take the poll at such place as he may direct. The person appointed to conduct the poll unlike the Chairman of a meeting, need not be, and indeed in the present instance was not, a shareholder of the Company. His functions in no way resemble those of a Chairman of a meeting, and are, as has been pointed out in *Harben v. Phillips* (1) purely ministerial. The operation of taking a ballot, too, has little resemblance to such a meeting, each shareholder may come at any time between the hours fixed, record his vote and go away. It is only the result of the poll which forms part of the meeting at which the poll was demanded by being deemed to be a resolution passed at it. "The taking of a poll" said Brett, L. J., in *The Queen v. Wimbledon Local Board* (2) "is a mere enlargement of the meeting at which it was demanded." In the same case Cotton, L. J., observes:

"A poll is not a new meeting, but it is a mode of ascertaining the sense of the meeting which is continued for that purpose. The meeting of ratepayers did not come to an end, for the poll which was demanded has never been held."

In *Shaw v. Tati Concessions Limited* (3), Swinfen Eady, J., after remarking that the taking of a poll is not a meeting, continues:

"The true legal position is this: there is no adjourned meeting but the original meeting continues for the purpose of taking the poll until the poll is closed."

For the principle that the poll is not complete, and therefore the general meeting endures, until the shareholders have had an opportunity of voting, I may refer to *The Queen v. The Vestrymen etc. of St. Pateras* (4). The position was defined with clearness by Russell, J. in *Spiller v. Mayo Development Co. Ltd.*, (5) in settling a question of the validity of certain proxies.

"It was well settled "he said that the taking of a poll was not a meeting of the Company in the strict sense" but was in law a mere continuation of the meeting at which the poll was directed to be taken."

No authority has been cited to us for the position which the respondents assume, which requires that the taking of the poll is in law a meeting convened by the Chairman, from which the inference sought to be drawn is that if the Chairman makes the default in holding the meeting, the shareholders' only remedy is to take the poll themselves unless they resolve to adjourn the meeting to some other day. I doubt whether in face of the wide powers delegated in this respect to the Chairman, the shareholders would be legally competent to do this. But it is unnecessary to decide that point, especially in the present case, where it appears to have been almost physically impossible for them to adopt this course. Ballot papers had indeed been printed, but they were locked up in the Manager's safe and the key was not accessible. The assembled shareholders had no official record of the names of the eleven candidates standing for election. It would probably appear, had the case been fully heard, that there were other obstacles.

(1) [1883] 23 Ch. D. 14=48 L. T. 334=31 W. R. 173.

(2) [1882] 8 Q. B. 459=51 L. J. Q. B. 219=46 L. T. 47=30 W. R. 400.

(3) [1913] 1 Ch. 292=82 L. J. Ch. 159=108 L. T. 487=20 Manson 104=57 S. J. 322=29 T. L. R. 261.

(4) 113 E. R. 317.

(5) [1926] W. N. 78=61 L. J. 301.

They took the only course apparent to them and dispersed without recording their votes. Even on the theory that a gathering of shareholders recording their votes is a meeting, it is difficult to contend that any meeting took place here. When and by virtue of what act did it begin, and when terminate? Having brought matters to this impasse by the breakdown of the arrangements which it was his duty to render effectual, the Chairman would now ask the Court to dismiss the claim of these persons on the ground that as matters fell out, their only course was to assume his functions and proceed with the election, failing which they must suffer disenfranchisement until the time should arrive for another annual general meeting. The alternative view, more commendable alike to the terms of the articles and to common sense, is that the Chairman having been enjoined by the shareholders to hold a poll and having under Art. 49 ample power to carry out their wishes, should have persisted in his attempts to do so until they were successful. I have heard no argument which, upon the true theory underlying these proceedings encourages me to hold that, when the first attempt broke down he was *functus officio*.

Let us now see by what machinery it is proposed to carry on the business of the Company in the meanwhile. It is sought to justify the action of the two policy-holders' Directors in the first place and of themselves and their co-opted Directors in the second in filling up the vacancies upon the directorate, by recourse to the provisions of Art. 68 (h), which enables Directors to appoint any duly qualified member as Director either to fill a casual vacancy or as an addition to the Board. Alternatively the powers conferred by Arts. 86 and 88 are invoked though a perusal of those articles will show that they do not enlarge the powers derivable from Art. 68 (h). The contesting defendants in their written statements justified the action taken up on one or other of these grounds, but before us such a position has been virtually abandoned and is obviously untenable. A casual vacancy means in general any vacancy occurring by death, resignation or bankruptcy and not by effluxion of time; *Palmer's Company Precedents*, Edn. 13, Part 1, p. 720, *York Tramways Co. v.*

Willows (6) and at p. 694, *Munster v. Cammell Co.* (7). Art. 69 defines the different modes in which such a vacancy arises. The occasion for appointing a Director "as an addition to the Board" will only arise when the shareholders have abstained from filling one or more of the sanctioned posts of Director. The rule has no application to the present circumstances. The article upon which reliance is now placed is No. 68 (g), which runs thus:

"If at any ordinary general meeting at which an election of Directors ought to take place, the place of any retiring Director is not filled up, such Director shall, if willing to continue in office, be deemed to have been re-elected at such meeting unless it shall be determined at such meeting to leave the vacancy or vacancies unfilled."

I leave on one side the argument, special to the circumstances of this case that since Directors retired and only five posts were sanctioned for the future, no one retiring Director could be said to have a "place" into which he could be deemed to be re-elected. The claim, may I think, be disallowed upon more general grounds. Nor is it necessary to point out that, to declare these so-called co-optations valid by virtue of this provision, a perversion of it to a use that can never have been in contemplation would have to be countenanced. It is a necessary condition of its application that the ordinary general meeting should have come to an end without an election of Directors, indeed it, was with the object in view of rendering its application possible that the arguments to which I have already referred were with some strenuousness advanced. So long as the meeting exists it appears that under the articles, as they now stand, the Directors' posts remain vacant. It was to save any inconvenience arising from this that a provision existed in the articles before amendment that the outgoing Directors should continue until their successors were elected: see old Art. 64, but whether by inadvertence or intention this has not been reproduced. If, as I hold, the general meeting has never been closed this provision for automatic re-election admittedly can have no application and the five Directors' places may still be filled up by election.

(6) [1882] 8 Q. B. D. 685=51 L. J. Q. B. 257=46 L. T. 296=30 W. R. 624.

(7) [1882] 21 Ch. D. 183=51 L. J. Ch. 731=47 L. T. 44=30 W. R. 812.

The remainder of the arguments addressed to us represent an attempt to prevent the Court from interfering. It would seem that in a case where the shareholders have through no fault of their own, been deprived of their fundamental privilege of choosing their own management and where that management has passed into the hands of persons with no legal title to enjoy it, if ever there was a case for the Court's interposition it must be this. Since however the learned trial Judge has taken a different view, and since the question has been elaborately argued before us it is advisable that we justify the course we propose to take by reference to authority. The questions raised are, firstly can an individual shareholder sue for the reliefs asked for by the plaintiffs; and if so, secondly ought the Court to interfere, having regard to such other remedies as may be available?

It is worthwhile to repeat here the nature of reliefs asked for. The plaintiffs sue for a declaration that they and the other shareholders are entitled to elect five shareholders, Directors and for a direction that a proper election by poll be ordered; as a necessary preliminary they ask also that it may be declared that the appointment of persons to fill the vacancies by co-option is illegal and invalid. In substance therefore the suit is one to establish and enforce the right of a shareholder to exercise his vote. Now in examining the authorities it will be found that the cases may be grouped according as the injury complained of is an injury to the shareholder, by infringing his individual rights, or only an injury to the Company in which the shareholder holds an interest. Cases falling within the former category may again be divided into those which relate to an injury to one or some only of the shareholders, and those which have arisen from a breach of duty towards all the shareholders; for it does not necessarily follow that where all the shareholders (except those of them who contrive the injury) are affected, an individual shareholder is precluded from suing. The test depends upon the nature of the wrong alleged. An instance of a case where some only of the shareholders were denied their legal rights is *Pender v. Lushington* (8) which arose from a poll at which the Chairman ruled out

certain votes which should have been included. Jessel, M. R. in deciding that the action could be maintained by the single shareholder who brought it observed:

"He is a member of the company and whether he votes with the majority or minority he is entitled to have his vote recorded—an individual right in respect of which he has a right to sue."

Other cases which fall within the same class are *Pulbrook v. Richmond Consolidated Mining Company* (9) and *Henderson v. Bank of Australasia* (10). The class which concerns us here however relates to acts in derogation of the rights of all the shareholders, and is represented by a number of instances of suits brought by individual shareholders. In *Mosely v. Koffyfontein Mines Ltd.* (11) the plaintiff sued the Company and the Directors on behalf of himself and the other shareholders to restrain the unauthorized issue of capital. It was a matter affecting the shareholders as a body, but the plaintiff was allowed to sue because, as Fletcher Moulton, L. J., put it: "it must be the right of a shareholder by reason of his being a shareholder to bring an action to stop such a proceeding."

It is to be observed that in such a case the Company itself, by resolution of its members, could also have sued to restrain the Directors from such an act. Another case involving a breach of duty by the Directors towards the whole body of shareholders is *Alexander v. Automatic Telephone Company* (12). Lindley, M. R., decided that it was not a matter of mere internal management—a description which it has been sought to apply to the conduct of the defendants in the present case—and that a suit by some of the shareholders was unobjectionable in form. *Baillie v. Oriental Telephone Co.* (13) related to failure on the part of the Directors to make a frank disclosure to the shareholders of the circumstances in which they claimed extra remuneration. It was argued that the plaintiff, a shareholder, was not entitled to sue to impeach the validity of a special resolution, but the

(9) [1878] 9 Ch. D. 610=48 L. J. Ch. 65=27 W. R. 377.

(10) [1890] 45 Ch. D. 330=59 L. J. Ch. 794=2 Meg. 301.

(11) [1910] 1 Ch. D. 73.

(12) [1900] 2 Ch. 56=69 L. J. Ch. 428=82 L. T. 400=48 W. R. 546=16 T. L. R. 339.

(13) [1915] 1 Ch. 503=84 L. J. Ch. 409=112 L. T. 569=31 T. L. R. 140.

(8) [1877] 6 Ch. D. 70=46 L. J. Ch. 317.

Court of appeal disallowed the objection on the ground, expressed by Swinfen Eady, J., that even a majority of the shareholders could not legalize an invalid act and prevent action being taken to set aside. This case bears upon the further question we have to decide—the remedy, if any, open to the plaintiffs at the hands of the Company. In *Hoole v. Great Western Railway Co.* (14) the power of the railway company to issue additional shares was in dispute. The question of the proper parties to the action was raised, and Sir John Holt, L. J., saw no reason why any single shareholder should not be at liberty to file a bill to restrain the Company from exceeding its powers.

"If one individual having an interest complains of an act of the whole Company, or the executive, of the whole Company, as being illegal there is, as a general rule, no necessity for any other shareholders being present."

The other line of cases, in which it has been held that the Company, not the shareholder, is the party to complain, opens with *Foss v. Harbottle* (15) decided by the Court of Chancery in 1843. This was a suit brought by two shareholders against the Directors and some others alleging that the Directors as Directors had bought for an excessive price certain lands from themselves as private individuals, and to find money for the purchase had mortgaged the Company's property in a manner unauthorized by the Act of Incorporation. Objection was taken that an individual shareholder could not sue, and the learned Vice-Chancellor, while conceding that in certain circumstances a suit might properly be so framed agreed that this was not such a case. The injury alleged was an injury to the Corporation as a whole, inflicted upon it, as a cestui qui trust, by its trustees and it was for the Corporation to deal with it. The purchase was not void but only voidable, and if the Corporation should choose to ratify it no individual shareholder could resist such action.

"The very fact that the governing body of proprietors assembled at the special general meeting may so bind even a reluctant minority is decisive to show that the frame of this suit cannot be maintained whilst that body retains its functions."

It might be that the mortgages were void as ultra vires, but that would not

in the circumstances dispose of the question because since the money received was expended in the manner stated, if the Corporation approved the Directors' action in making the purchases it could not complain of the manner in which they raised the money. The principles on which this case was decided were thus that there was no infringement of the individual rights of a shareholder, only a possible injury to the Company as a corporate body, and secondly, since it would lie with the Company to ratify it must also lie with it to challenge whether by suit or otherwise. The same principles were applied by Lord Cottenham, L. C., in *Mozley v. Alston* (16), where two shareholders complained of the omission of the twelve Directors to ballot out four of their number, in order that four others might be elected in their stead. This case certainly in some respects resembles the case now before us; but it is perhaps permissible to surmise that since 1847, when *Mozley v. Alston* (16) was decided, some modification of the attitude then taken up by the Court of Chancery has taken place, in the same way as Lord Cottenham himself recognizes that a relaxation was apparent in his own day "to meet the exigencies of modern times."

The observations of Swinfen Eady, L. J., upon this case in *Baillie v. Oriental Telephone and Electric Company Ltd.* (13), suggest that the stringency of the rule laid down in these two earlier cases has been relaxed in more modern times. The remaining case of this class cited to us *Macdougall v. Gardiner* (17), dealt with what was at the most an irregularity, James L. J. expressly excluding illegal, oppressive, or fraudulent acts from the scope of the principles on which he acted. Even therefore adopting the position assumed by these earlier Chancery cases in all its rigour, I do not find reasons in them to nonsuit the plaintiffs here.

Nor do I think that the contesting respondents are on any better ground in contending that the plaintiffs should have availed themselves of facilities for rectifying the position afforded by the Articles of the Company. The learned trial Judge considered that it was open to the shareholders by special resolution to remove the so-called Directors from office, a course dependent upon securing a three-

(14) [1868] 3 Ch. A. 262=17 L. T. 153=16 W. R. 260.

(15) [1842] 67 E. R. 189.

(16) [1847] 41 E. R. 833.

(17) [1875] 1 Ch. 13=45 L. J. Ch. 27.

fourths majority. The reasonableness of referring the plaintiffs to such a procedure has not been pressed upon us in appeal, and indeed it hardly seems right to tell a shareholder who complains of acts committed in defiance of the Articles of Association that the enforcement of his legal rights is dependent upon securing such a majority. Mr. T. R. Venkatarama Sastri prefers to adopt the position that a mere majority of shareholders would be able to validate the acts ultra vires by the Chairman and his party, but here again I think that he bases his arguments upon a fallacy. It is no doubt true that if the Directors of a Company act ultra vires, and if what they have done would be within the power of the Company, acting within its Memorandum and Articles of Association to do, the Company can ratify the action taken. It cannot so ratify it by a simple majority if by a general resolution it could not sanction such a course. The effect of the cases cited to us has been thus summed up by Lindley (Edn. 6, Vol. 1, p. 769).

"..... if Directors or shareholders have done or about to do that which is a fraud upon the minority, or is wrong, even if sanctioned by a majority, then an action by some of the members on behalf of themselves and others, or by a member suing alone, may be sustained, for otherwise the dissentients would be without redress."

It is surely enough to point out that even a majority cannot act in breach of rules which they have agreed shall regulate their actions. "The Articles" observed Swinfen Eady, J. in *Boschoock Proprietary Co. Ltd. v. Fuke* (18), "until altered, bound the shareholders in general meeting as much as the Board", the case being one of attempted confirmation of a Director not possessing the necessary qualifications. The Companies Act gives statutory force to this principle by providing in S. 21 that the Memorandum and Articles bind the Company or the members thereof to the same extent as if they respectively had been signed by each member and contained a covenant on the part of each to observe all their provisions. Accordingly to say that the course taken in the present case could have been ratified by the vote of the majority is equivalent to saying that the Articles permit the election of Directors

to be made otherwise than at the ordinary general meeting, as Art. 68 (f) provides and otherwise than by submission of the names of all eligible candidates to the choice of the voters. It is evident that a resolution proposing that certain five persons be appointed Directors is not only unauthorized by the Articles but would be a departure not only in form but in effect from the accepted procedure.

I have come to the conclusion therefore that the only course compatible with enforcing the rights to which the plaintiffs are entitled under the Articles of Association is to declare that the so-called co-optation of defendants 3 to 7 to the vacant posts of Directors is illegal, and that the shareholders are entitled to elect five of their number to those vacancies. Defendant 3, as Chairman, will be directed to proceed with the operation of election, and to take a poll after due notice to all shareholders and within ten days of the date of this judgment. Defendants 1 to 3 and 7 will pay the plaintiffs' costs here and below, and each defendant will pay his own costs. In view of the importance of the case we fix the advocate's fee for the appeal at Rs. 1,000. The actual costs of printing will also be included in the costs.

Cornish, J.—I agree that the co-option of defendants 3 and 4 on 16th October and of defendants 5, 6 and 7 on 23rd October as Directors cannot be justified under Art. 68 (h) or Art. 86 of the Articles of Association and was ultra vires. Defendant 4 filed a written statement claiming to be one of the Directors by reason of his co-option by defendants 1 and 2; but we are told that he has since withdrawn from that body. Defendants 5 and 6 by their written statements have repudiated their supposed co-option. They claim that as retiring Directors they continue in office till their successors are actually elected, or that by virtue of the provision of Art. 68 (g) they are to be deemed to have been re-elected. These two defendants together with defendants 3, 7 and 8 are five of the six shareholders' Directors who under the Articles of Association were due to retire at the ordinary general meeting on 13th October. Defendants 3 and 7 also rely on Art. 68 (g). Defendant 8 has not put in a written statement. The learned counsel for defendants 5 and 6 has not pressed the first

(18) [1906] 1 Ch. 148=75 L. J. Ch. 261=94 L. T. 398=54 W. R. 359=13 Manson 100=22 T. L. R. 196.

part of his clients' contention, and I think it is untenable.

"A Director" said Sargant, J., in *In re Consolidated Nickel Mines Ltd.* (19) at p. 893 "does not ordinarily step into an office which is perpetual unless terminated by some act, but into an office the holding of which is limited by the terms of the Articles."

By Art. 63 the six shareholders' Directors vacated office at the annual general meeting on 13th October. Having vacated their office at that meeting there could be no question of their still continuing in the office when a poll was pending to fill up the vacancies caused by their retirement. The provision of Art. 68 (g), then has to be considered. This says :

"If at any ordinary general meeting at which an election of Directors ought to take place, the place of any retiring Director is not filled up, such Director shall, if willing to continue in office, be deemed to have been re-elected at such meeting, unless it shall be determined at such meeting to leave the vacancy or vacancies unfilled."

It has been suggested that Art. 68 (g) can have no application because there were six Directors due to retire, but under the amended articles only five vacancies to be filled. But admittedly one of these gentlemen had written to the Chairman on 13th October stating that for reasons of health he was not standing for election, and I do not see how a person who has withdrawn his candidature for election could be regarded as capable of being deemed to have been re-elected under the provisions of Art. 68 (g). There would therefore be no objection on that ground to the five retiring Directors, who were seeking re-election having the benefit of this article.

The question is whether in view of what happened on 20th October, there has been such a failure to elect Directors as will entitle defendants 3, 5, 6, 7 and 8 to claim to have been re-elected in pursuance of Art. 68 (g). In other words, has the meeting at which the election of Directors ought to have taken place terminated without the vacancies being filled up? Now it is beyond dispute that when the shareholders arrived at the Company's premises for the poll, which had been fixed by defendant 3, the Chairman, to be held there between the hours of 4 and 5 p. m., it was not until 5-20 p. m., that they learned that the Returning Officer appointed to take the poll was unable to attend. No arrangements had

been made for any other person to conduct the poll. The Assistant Manager who was on the premises reported that he had no instructions in the matter; and it is admitted by the Returning Officer that the proxies and voting papers for the poll were locked in a safe of which he had the key, and were not available because defendant 3, to whom he sent the keys when he reported his inability to attend, was absent from Madras and did not get his message until 6-45 p. m., that evening. It has been contended that, in spite of all this the assembled shareholders had the remedy in their own hands that under Art 44 they might have chosen one of their number to be Chairman in the absence of defendant 3 and have proceeded with the business of the poll using such pieces of paper for the purpose of voting papers as might have been available; or that under Art. 46 they might have resolved to adjourn the meeting to some other date for the taking of the poll. Arts. 44 and 46 in terms apply to ordinary general meetings. In my opinion an assembly of shareholders for the purpose of recording their votes at a poll had no power to fix some other date than that already fixed for the holding of the poll. The position when a poll has been demanded and directed to be taken at a future date is that the meeting subsists in contemplation of law until the poll has been taken or as Brett, L. J., expressed it, "the taking of the poll is a mere enlargement of the meeting, at which it was demanded;" *Reg v. Wimbledon Local Board* (2); see also *Shaw v. Tati Concession Ltd.* (3) and *Spiller v. Mayo* (5). In the last mentioned case Russell, J., said :

"It was well settled that the taking of the poll was not a meeting of the Company in the strict sense, but was in law a continuation of the meeting at which the poll was directed to be taken."

Article 49 regards the taking of the poll in the same sense, for it says:

"The result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded."

The conclusion upon these authorities is the legal conception of the meeting being that it continues for the purpose of taking the poll, that the meeting continues for that purpose only and for no other purpose or business.

The last question therefore resolves itself into this: Has the breakdown of the

(19) [1914] 1 Ch. 883=83 L. J. Ch. 760=111
L. T. 243=21 Manson 273=58 S. J. 556=
30 T. L. R. 447.

arrangements for the poll on 20th October put an end to the taking of a poll? I do not think so. In my opinion the words in Art. 68 (g):

"if at an ordinary general meeting at which an election of Directors ought to take place,"

imply that it must be possible for the poll to be taken at the appointed time and place. There must at least be a reasonable opportunity to the voters and to the candidates of having the poll taken: see *Reg v. St. Mary's Lambeth* (20). In the present case it is to be observed that there were 11 candidates for the five vacancies. And if unforeseen circumstances have arisen to prevent the poll being taken then I think that, not only has there been no termination of the election, but that it became the duty of the Chairman defendant 3 (and he had the power under the articles) to appoint some other time for the taking of the poll. The rule is, that if a poll is demanded it must be taken, and this is so even though the Chairman refuses to grant the poll: *Reg v. Wimbledon, Local Board* (2). Art. 49 is equally emphatic. It says:

"If a poll is demanded as aforesaid (i. e., at the general meeting) it shall be taken,"

and it goes on to provide that it is to be taken

"in such manner, and at such time and place as the Chairman of the meeting directs and either at once, or after an interval or adjournment, or otherwise."

The language of the Article leaves no doubt in my mind that it was open to defendant 3 as Chairman, and indeed obligatory upon him, when he learned that the poll could not be held on the 20th to appoint another date for it.

Finally it has been objected that the matter being one of internal management of the Company's affairs the Court has no jurisdiction to interfere, and that the plaintiff's suit is unsustainable. It was upon this objection that the learned trial Judge dismissed the suit. A number of authorities have been cited to us. I do not think it necessary to refer to them in detail, because the law upon the subject has been compendiously stated by Lawrence, L. J., in *Cotter v. National Union of Seamen* (21) at p. 107 as follows:

"If an act is intra vires the Corporation, and therefore one which could be sanctioned by the

(20) 8 Ad. & E. 257.

(21) [1929] 2 Ch. 58=98 L. J. Ch. 323=141

L. T. 178=13 S. J. 206=45 T. L. R. 352.

majority of the Corporators properly assembled in general meeting, the Court will not entertain any proceedings to restrain the doing of the act resolved upon unless such proceedings are brought by the majority of the Corporators and in the name of the Corporation itself."

It has been contended that assuming defendants 3, 5, 6, 7 and 8 have usurped the office of shareholders' Directors, this was a matter capable of confirmation by the Company in general meeting, though no meeting of the company has in fact sanctioned it. In other words, the argument is that the Company, which means, of course, a majority of the general body of shareholders, could by a resolution override the articles which require Directors to be elected, and resolve that these five gentlemen who have contrived to step back into office without an election should remain there. I do not think that this would be intra vires a general meeting of the shareholders, for the articles, until altered (and this according to S. 20, Companies Act, can only be done by special resolution), bind the shareholders in general meeting as much as the Board: see *Boschoek Proprietary Co. v. Fuke* (18). It seems to me that the principle of that case governs this case where five gentlemen have been installed as Directors in contravention of the articles. Such a mode of constituting Directors would be equally ultra vires the Board and the Company to sanction. This being the case, and there being no adequate remedy open to the plaintiffs under the articles, I think it falls within the rule that the Court has jurisdiction to entertain a suit by shareholders against the Company in respect of an infringement of their individual rights as shareholders when the interests of justice so require: *Baillie v. Oriental Telephone Co.* (13). For these reasons I agree that there should be a declaration that defendants 3, 5, 6, 7 and 8 are not Directors of the Company, and with the order directing defendant 3 as Chairman to take the poll.

P.R.S./B.V. Order accordingly.

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WALLACE AND MADHAVAN NAIR, JJ.
Chengazhisseri and another — Petitioners.

v.

Board of Commissioners of Hindu Religious Endowments—Respondent.

Civil Revn. Petn. No. 1746 of 1927,
Decided on 28th April 1931.

Madras Religious Endowments Act (1925), S. 84 (2)—District Court cannot direct remand.

A District Court has no authority under S. 84 (2), to direct a remand and rehearing of a case. [P 109 C 1]

P. Govinda Menon—for Petitioner.

Govt. Pleader P. Venkataramana Rao—for Respondent.

Judgment.—In our view the District Court had no authority under S. 84 (2), Madras Religious Endowments Act, to direct a remand and rehearing of the case. The powers conferred on the Court by that section are only to modify or set aside the decision of the Board and of course, to dismiss the application. If the section had meant that the Court was an appellate authority with all the normal powers of an appellate Court, we should expect that to have been stated. The District Court's order is therefore without jurisdiction and we must set it aside and direct that it pass a proper order in accordance with its powers under the section. Each party will bear his own costs.

P.R.S./V.B.

Order set aside.

* A. I. R. 1932 Madras 109

WALLER AND PANDALAI, JJ.

(*Pana Ana Rana*) *Arunachallam Pillai*
—Defendant—Appellant.

v.

Govindaswami Naicker and another—
Plaintiffs—Respondents.

Second Appeal No. 1180 of 1926, Decided on 17th September 1931, against decree of Sub-Judge, Sivaganga, D/- 31st October 1925, in A. S. Nos. 23 and 26 of 1925.

(a) Civil P. C. (1908), S. 34—Interest from date of suit to date of decree is in discretion of Court—Where contract rate is not inequitable that rate will be adopted.

By S. 34, the award of interest as well as the rate at which it is to be awarded from the date of suit to date of decree is in the discretion of the Court though where the contract rate is not inequitable that rate will be adopted: 3 *All.* 91, *Foll.* [P 110 C 1]

* (b) Interest—Tender before suit refused by creditor—To stop running of interest such tender must be followed by payment into Court when creditor sues for money.

Where a creditor has improperly refused tender of debt money by the debtor then in order to stop the running of interest a tender before suit must be followed by payment into Court when the creditor sues for the money. This is so because a debtor who is required to keep his tender good must when he is sued certainly understand that the debt is being demanded through the Court and as he must be able and willing at any time after tender to pay it on

demand he can demonstrate his ability and willingness after the matter has come to Court only by bringing the money into Court: 38 *Mad.* 959 and 16 *Bom.* 141, *Rel. on.*; A. I. R. 1929 *Mad.* 230; A. I. R. 1926 *Mad.* 601; 4 *Cal.* 572; 26 *Bom.* 643; 40 *Mad.* 804; A. I. R. 1928 *Cal.* 874; 35 *Mad.* 44 and 34 *Cal.* 305, *Ref.*; 38 *I. C.* 295; A. I. R. 1926 *Cal.* 310 and 33 *Mad.* 100, *Dist.*; A. I. R. 1926 *Cal.* 310, *Foll.* [P 111 C 1, 2]

A. Sundaram Ayyar—for Appellant.

K. Rajah Ayyar and V. Ramaswami Ayyar—for Respondents.

Judgment.—This appeal is by the defendant in a suit for money and raises two points as to interest. The amount sued for consisted partly of the price of cloth sold by the plaintiff, a trader, to the defendant who is also a trader in cloth and partly of an amount of Rs. 500 advanced to the defendant on a pledge of a kasumalai. The defence as to interest on the price of the cloth was that there was no contract for interest either express or to be implied from the usage of trade and as to interest on the loan on the pledge, that the defendant had tendered the amount borrowed (Rs. 500) with interest at Re. 1-2-0 per cent per mensem on 20th September 1923, i. e., about 25 days before the suit, that the plaintiff had improperly refused to accept the amount and return the pledged jewel and that therefore the plaintiff was not entitled to further interest from the date of tender or to costs of suit on that head of the claim.

As to interest on the price of cloth it has been found by both the lower Courts that according to the usage of trade interest was payable. There is considerable evidence to support this finding including the defendant's own admission that he has charged interest against other traders on similar transactions and in view of this finding which is one of fact, the appellant's objection is not sustainable.

As to interest on the pledge the question is whether on the findings of both Courts that the defendant did tender the money on 20th September 1923 and that the plaintiff improperly refused to accept the tender on the allegation that the pledge covered the price of the cloth also, subsequent interest on that amount of Rs. 500 was allowable. The District Munsif disallowed subsequent interest and proportionate costs. But the learned Subordinate Judge held that as defendant had not deposited the money in Court when sued for it, the tender prior

to suit though improperly refused was ineffective to stop running of interest. He awarded plaintiff interest at the contract rate up to the date of decree and also the costs disallowed by the first Court. This is the question which was strenuously argued before us for the appellant. Before going into the question it may be pointed out that in this case the tender was made on 20th September 1923 and the suit was brought on 15th October 1923. By S. 34, Civil P.C., the award of interest as well as the rate at which it is to be awarded from the date of suit to date of decree is in the discretion of the Court though where the contract rate is not inequitable that rate will be adopted: *Sophia Orde v. Alexander Skinner* (1) (at 106, 107). Therefore the only interest to which the appellant's objection, if successful, can apply is that for the period of 25 days between the above two dates which amounts to Rs. 4-11-0.

The Subordinate Judge has relied on *Sabapathy v. Vanmahalinga* (2), which itself follows *Haji Abdul Rahman v. Haji Noor Mahomed* (3) for the proposition that in order to stop the running of interest a tender before suit must be followed by payment into Court when the creditor sues for the money. The appellant's advocate argues that there was no decision of the point in *Sabapathy v. Vanmahalinga* (2) and that the observation to that effect at p. 970 was obiter. This argument is correct. But the observation is based on *Haji Abdul Rahman v. Haji Noor Mahomed* (3) at pp. 149 and 150 where the point was expressly decided. The rule is based on English authorities and practice of long standing mentioned there. The general rule is referred to by Wilson, J., in *Boyle Chund Sing v. Moulard* (4) and by a Bench of the Calcutta High Court in *Rakkal Chandra v. Baikuntha Nath* (5) which was a case under the Bengal Tenancy Act by S. 150 of which the defendant is required to deposit the admitted amount of rent into Court before the Court can take cognizance of a plea that the plaintiff's suit is for an excessive amount. The principle on which a

valid tender must be kept good in order to stop running of interest is explained at length in *Jagat Tarini Dasi v. Naba Gopal Chaki* (6) at p. 322 et seq. In the case of ordinary money claims not based on mortgage as to which the effect of tender is laid down by S. 84, T. P. Act, the best way in which a defendant whose tender has been refused can show that he has kept the tender good is by depositing the money in Court when sued for it. That appears to be the reason of the rule. The rule is expressly stated in Mulla's Civil Procedure Code in the commentary on O. 24, R. 3 and is illustrated by form No. 4 of written statements in Appendix A to the Code.

But the appellant's advocate has referred to *Pedda Veeranna v. Gondimalla Veeranna* (7) and *Gajendra Narain Maity v. Sita Nath Das* (8), in addition to numerous decisions turning on S. 84, T. P. Act. In *Pedda Veeranna v. Gondimalla Veeranna* (7), there was an award ordering payment of a debt in three instalments. After one instalment was paid the creditor refused the debtor's tender of the other two instalments though made on or before the due dates. The debtor thereupon got the award made into a decree of Court by which the instalments were made payable on the dates mentioned in the award which had already expired and apparently without providing for any interest on the sums mentioned. As this decree was passed after contest by the creditor who attacked the award as invalid one would have thought that he could not in execution claim any interest which would be held to have been refused by the decree: see S. 34, Civil P. C. But he did make such a claim and it was refused by the District Judge. In upholding such refusal their Lordships made no mention of what appears the plainest ground for the refusal that the decree did not provide for interest. But they supported the refusal by accepting the respondents' argument that as he had made tenders which were wrongfully refused before the award decree, interest ceased to run from the date of tender even without paying the money into Court. For this S. 84, T. P. Act, and the decision in *Vela-*

(1) [1891] 3 All. 91=7 I. A. 196 = 4 Sar. 178 (P.C.).

(2) [1915] 38 Mad. 959=23 I. C. 581.

(3) [1892] 16 Bom. 141.

(4) [1879] 4 Cal. 572.

(5) A. I. R. 1928 Cal. 874=117 I. C. 687.

(6) [1907] 34 Cal. 305=5 C. L. J. 270.

(7) [1917] 38 I. C. 295.

(8) A. I. R. 1926 Cal. 310=90 I. C. 637.

yuda Naicker v. Hyder Hussain Khan (9) which was a mortgage case, were relied on. We must respectfully say that neither S. 84, T. P. Act, nor the decision cited governed the case as it was not a mortgage case. We may add that it was the debtor who applied to have the award made a decree of Court and that therefore there was no proceeding or suit by the creditor in answer to which the debtor could have paid the money into Court to keep the tender good. On this point therefore we are unable to follow the grounds of that decision, though the decision itself was correct on the ground mentioned above.

The language of the decision in *Gajendra Narain Maity v. Sita Nath Das* (8), is directly in favour of the appellant's argument. The defendant who had borrowed Rs. 350 at 36 per cent from the plaintiff tendered the money with interest in July 1916. But the plaintiff wrongfully refused it and brought a suit in 1920 for the sum with interest to date of suit. The lower appellate Court held the tender good and the plaintiff's refusal wrong but as the defendant had not deposited the money in Court it awarded the plaintiff six per cent interest from the date of tender. The plaintiff appealed and it was obvious that if the tender without payment into Court did not stop the running of interest as the award of six per cent showed, the plaintiff should have got not six per cent but the contract rate of 36 per cent. But if the tender stopped the running of interest the award of six per cent was wrong, though in the absence of an appeal by the defendant the Court could not interfere with that. The Court consisting of Subrawardy and Deval, JJ., held that in the absence of any provision in the law of contract or of procedure applicable to Indian Courts it cannot be laid down as a binding rule of law that if a tender is not followed by a deposit in Court it is ineffectual to stop running of interest. The reasoning of this decision pronounced in 1925, is in direct conflict with that of *Rakhal Chandra Chakhadar v. Baikuntha Nath Barasi* (5) and in both of them Subrawardy, J., participated.

We consider the later Calcutta decision more in accord with precedent and the reason of the thing. A debtor who is required to keep his tender good must

when he is sued certainly understand that the debt is being demanded through the Court and as he must be able and willing at any time after tender to pay it on demand he can demonstrate his ability and willingness after the matter has come to Court only by bringing the money into Court. Although in the abstract it is possible to argue that though the defendant has not deposited the money in Court and so placed his ability and willingness beyond question, he may be able to prove by other evidence that he was always ready and willing to pay the debt, to accept that argument would be to introduce much uncertainty into a test which is simple and conclusive and which has been accepted and acted on by the Courts in England and India for a very long time.

We think it unnecessary to consider in detail the effect of tender in mortgage transactions which is governed by S. 84, T. P. Act, or the large number of decisions which have been cited: *Velayuda Naicker v. Hyder Hussain Khan Sahib* (9), *Krishnaswami Chettiar v. Ramaswami Chettiar* (10), *Thevaraya Reddy v. Venkatachalam Pandithan* (11), *Rambhadra Thevar v. Arunachalam Pillai* (12), *Venkatarama Ayyar v. Gopalakrishna Pillai* (13) and *Pandurang v. Dadabhoy* (14). It is clear from S. 84 that in mortgages a tender alone has the effect of stopping interest from the date of the tender. The reason of the difference between mortgages and other debts in this respect would appear to be that rule in Chancery was different from that at common law:

"A tender of the amount due on the mortgage at the time when the mortgagee is bound to receive it stops interest from running if the mortgagor keeps the money ready to pay over to the mortgagee: Hals Vol. 21, p. 229."

"Refusal of a proper tender is not equal to payment, but if the money, after the refusal has been paid into Court or kept for immediate payment to the mortgagee, no further interest is payable."

The rule at law is stated to be that where the promise is to pay a sum of money, tender coupled with continued readiness to pay the debt is an answer to a subsequent action for nonpayment if the amount of the debt is paid into Court

(10) [1912] 35 Mad. 44=8 I.C. 763.

(11) [1917] 40 Mad. 804=37 I.C. 444.

(12) A.I.R. 1926 Mad. 601=95 I. C. 108=49 Mad. 609.

(13) A.I.R. 1929 Mad. 230=116 I. C. 844=52 Mad. 322.

(14) [1902] 26 Bcm. 643=4 Bcm. L.R. 453.

(9) [1910] 33 Mad. 100=3 I.C. 729.

and operates as a bar to any claim to subsequent interest: Hals. Vol. 7, p. 418.

For these reasons, we think that the opinion of the Subordinate Judge on this point was right.

The second appeal is dismissed with costs.

P.R S/B.V.

Appeal dismissed.

*** A. I. R. 1932 Madras 112**

CORNISH, J.

Rm. V. Vaithianatha Aiyar and others
—Petitioners.

v.

Kochi S. Vaithianatha Aiyar and another—Respondents.

Civil Revn. Petn. No. 1864 of 1930, Decided on 22nd July 1931, against order of Dist. Court, Tinnevely, D/- 4th October 1930.

(a) Civil P. C. (1908), S. 148—S. 148 does not apply to time limit fixed by statute.

Section 148 in terms applies to an enlargement of a time limit fixed by the Court, and it can have no application to a time limit fixed by statute: *A. I. R. 1926 Mad. 689, Foll.*

[P 113 C 2]

* (b) Provincial Insolvency Act (1920), S. 78—S. 5, Limitation Act, does not apply to insolvency petition as it is not "application"—Limitation Act (1908), S. 5.

An insolvency petition by a creditor or debtor is not an "application." A reference to S. 5, Limitation Act, leaves no doubt upon the question, its language shows that the applications intended are applications of the description in Sch. 1, Divn. 3, Limitation Act, which may arise in the course of or out of proceedings in insolvency.

[P 114 C 1]

(c) Provincial Insolvency Act (1920), S. 9 (1) (c)—Insolvency petition cannot be amended so as to add new creditor after three months of act of insolvency.

It is not competent to a Court under the Insolvency Act or the incorporated provisions of the Civil Procedure Code and the Limitation Act to allow an insolvency petition to be amended by the addition of a creditor who was not a party from the beginning when three months have expired since the act of insolvency: *In re Maund*, (1895) 1 Q.B. 194, *Foll.*; *Re a Debtor*, 86 L. T. 688; 37 *Mad. 555*; *A. I. R. 1929 Rang. 291* and *A. I. R. 1928 Mad. 608, Ref. and Expl.*

[P 114 C 1]

(d) Provincial Insolvency Act (1920), S. 9—Insolvency application by member of firm but not on its behalf—Other member creditor cannot be added after three months of act of insolvency.

Where an insolvency petition is not in the firm name of the petitioners and where it is not also in the names of all the members of the firm, nor does it purport to be signed on behalf of the firm or its members by the petitioner signatory, the petition cannot be regarded either in form or in substance as a petition by all the partners of the firm and therefore the addition of a new partner-creditor to the insolvency peti-

tion after expiry of three months since the act of insolvency cannot be allowed: *Re Hobbs*, 66 L. T. 144; 33 *I. C. 357*; 25 *I. C. 945*; 40 *I. C. 108* and 28 *I. C. 210, Dist. and 40 I. C. 108, Ref.*

[P 114 C 2]

K. Rajah Ayyar and V. Ramaswami Iyer—for Petitioners.

K. Bhashyam Iyengar and T. R. Srinivasan—for Respondents.

Judgment.—An insolvency petition was filed on 27th August 1929 against the debtors, who are the petitioners in this civil revision petition. In the insolvency petition one Kochi S. Vaithianathier is named as the petitioner. In para. 4 of the petition it is stated:

"Petitioner is the managing partner of a family firm consisting of himself and his first paternal cousins K. Vaithinathier and Vishwanathier."

In para. 9 are set out various acts of insolvency by the respondents on dates ranging from 11th August to 13th August 1929, within the period of three months from the date of the filing of the petition.

On 16th September, K. Vaithinathier made application under S. 16, Provincial Insolvency Act, to be substituted for Kochi S. Vaithinathier on the ground of Kochi's want of due diligence in proceeding with the petition, but this petition was dismissed as want of diligence had not been established.

On 10th October Kochi applied to have his partner Viswanathier added as a party to the petition; and this man was added a respondent. On 20th December Kochi made a further application to have his other partner Vaithinathier made a party to the petition. This was dismissed on the ground that a creditor could not be made a party to the petition after the expiry of three months from the date of the act of insolvency.

The insolvency petition came on for hearing in March 1930 and was dismissed; the Subordinate Judge holding that it was not maintainable on account of the nonjoinder in the petition of all the partners of the firm to which the respondents were alleged to be indebted.

On appeal the lower Court's order was set aside. The learned District Judge held that the power of the Court *sue motu* to add necessary parties in a fit case was unfettered, and he remanded the insolvency petition for rehearing after the third partner Vaithinathier had been made a party.

The principal question argued on behalf of the petitioners here (the debtors) is whether, having regard to S. 9, Provincial Insolvency Act, the amendment of the petition could be made. S. 9 (1), Cl. (c), provides that a creditor shall not be entitled to present an insolvency petition against a debtor unless the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition. Reliance is placed on *In re Maund* (1), where it was held by a Divisional Court consisting of Vaughan Williams and Wright, JJ., that a petition will not be allowed to be amended by adding a petitioner after three months from the date of the act of bankruptcy. At p. 197 Vaughan Williams, J., said:

"It is perfectly clear that the Court ought not to allow, after three months have elapsed from the date of the committal of the act of bankruptcy, the introduction of creditors, as petitioning creditors, who could not themselves present a petition."

And a little further on he observed:

"Our attention was called to several cases which, it was said, established that the power of amendment could be exercised after the three months had elapsed. In all those cases, however it will be seen that the person added was not essential to the petition by virtue of the requirement of the Act, but only by virtue of the rules of practice of the bankruptcy Court."

At p. 195, in a remark made by the learned Judge in the course of the argument, he again refers to the difference between allowing an amendment in order to conform to some rule of practice and of allowing an amendment which would have the effect of dispensing with the statutory requirement that a creditor's petition must be filed within three months of the act of bankruptcy. This distinction was again emphasized in *Re. a Debtor* (2), where a petition not properly attested under the rules of practice was allowed to be amended, Wright, J., observing:

"This was not like a case where a new petitioning creditor is added."

The principle of *In re Maund* (1), was cited with approval by Sir Arnold White, C. J., in *Gunnis & Co. v. Mohamed Ayyub Sahib* (3), though it was not necessary to apply it in that case. Mr. Bhashyam Ayyangar has invited me to disregard *In*

re Maund (1) and to follow *L. C. T. R. M. S. Chettyar v. A. S. Chettyar Firm* (4) and *Venkata Hanumantha Rao v. Gangayya* (5). But these cases in no wise disagree or conflict with *Maund's* case (1). They distinguish it on the ground that its principle would have no application to cases where the validity of the petition was not in question.

The argument is that, assuming the petition to be invalid, as I think it was on account of the non-joinder of all the creditor-partners, it is open to the Court to allow it to be amended, notwithstanding S. 9 (1) (c), Insolvency Act. It has therefore to be considered whether there is anything in the Provincial Insolvency Act, or in the provisions of the Civil Procedure Code and of the Limitation Act which have been incorporated in the Insolvency Act, which enables the Court to make the amendment and so to virtually override the enactment of S. 9, Insolvency Act. The learned counsel for respondents in the revision petition has relied first on S. 148, Civil P. C. But S. 148 in terms applies to an enlargement of a time limit fixed by the Court and it can have no application to a time limit fixed by statute: *Narasimha Ayyar v. Rangachari* (6). Nor do I think that the power to add parties conferred upon the Courts by the Civil Procedure Code enables this amendment to be made, in view of the limitations placed by S. 5, Insolvency Act upon the application of the Civil Procedure Code to proceedings in insolvency. S. 5 provides:

"Subject to the provisions of this Act, the Court, in regard to proceedings under this Act, shall have the same powers and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction."

Therefore there is not a complete but only a limited power of applying the provision of the Civil Procedure Code to insolvency proceedings. To allow this amendment would have the effect of enlarging the time limit fixed by S. 9, Insolvency Act. That would be to make the powers exercisable under the Civil Procedure Code superior to and not subject to the provisions of the Insolvency Act; and, having regard to the terms of S. 5, Insolvency Act, it cannot be done.

(1) [1895] 1 Q. B. 194=64 L. J. Q. B. 183=15 R. 159=72 L. T. 58=43 W. R. 207.

(2) [1902] 86 L. T. 688.

(3) A. I. R. 1914 Mad. 637=19 I. C. 19=37 Mad. 555.

(4) A. I. R. 1929 Rang. 291=122 I. C. 235=7 Rang. 785.

(5) A. I. R. 1928 Mad. 608=110 I. C. 611=51 Mad. 594.

(6) A. I. R. 1926 Mad. 689=95 I. C. 444.

It may be observed that if the delay of the creditor-petitioner in applying for the amendment had been occasioned by fraud, then there would be a case where it has been said the Court would strain its jurisdiction to the utmost: *In re Maugham* (7). But no fraud is imputed here. The failure of the creditor-petitioner to apply in time for the requisite amendment was due to his own dilatoriness. Then there is S. 5, Lim. Act, which has been made applicable by S. 78, Insolvency Act, "to appeals and applications under this Act," i. e., the Insolvency Act. I am clearly of opinion that an insolvency petition by a creditor or debtor is not an "application." A reference to S. 5, Lim. Act, leaves no doubt upon the question; its language shows that the applications intended are applications of the description in Sch. 1, Divn. 3, Lim. Act, which may arise in the course of or out of proceedings in insolvency. I hold therefore that it is not competent to the Court under the Insolvency Act or the incorporated provisions of the Civil Procedure Code and Limitation Act to allow this insolvency petition to be amended by the addition of the third creditor-partner when three months have expired since the act of insolvency.

But there is a further and alternative argument that the petition is sufficient as it stands. It is contended that inasmuch as the petition is substantially a petition of all the creditor-partners, and the proposed amendment a formality, the bringing of Vaithinathier into the array of parties would not amount to the adding of a new party to the petition. This would be so, no doubt, if the contention were well founded: see *Muthukrishna Pillai v. Rajam Ayyangar* (8) and *Rajam Ayyangar v. Muthu Krishna Pillai* (9). But the only place in the petition where Vaithinathier's name is mentioned is in para 4, where the petitioner says that he is the managing partner of a firm of which Vaithinathier is a member. That statement does not make Vaithinathier a party to the petition. Nor is he made a party by the fact that in the subsequent interlocutory applica-

tions in October and December to have Viswanathier and Vaidyanatha Ayyar made parties, the petitioner stated that he had instituted the insolvency proceedings as managing partner on behalf of his partners. Reference has been made to three cases by the learned counsel for the creditors, viz., *Sheo Lal Sahu v. Sagar Mal* (10), *Narayya Chetty v. Sami Chetty* (11) and *Re. Hobbs* (12). But I do not think they serve to substantiate his point.

In *Sheo Lal Sahu v. Sagar Mal* (10) where a partner sued for a debt due to the firm, making his partners defendants, it was held that the suit was effectively a suit by the firm, but that the plaint should be amended by describing the partnership firm as plaintiff. There all the partners were parties to the suit. In *Narayya Chetty v. Sami Chetty* (11) the plaintiff had prefixed the firm name to his own, and it was held that the suit should be regarded as a suit brought on behalf of the firm. In that case the firm name was clearly used to indicate that it was a party, although in association with the name of one of the partners.

Re. Hobbs (12) was quite a different case. The petition was in the firm name and in the names of the two partners who had constituted the firm though they had dissolved partnership, and the petition was signed on behalf of the firm by one of its late members. Bowen, L. J., described the position thus:

"This petition is really a petition by two persons, and is signed by one of these two persons who asserts on its face that he is authorized to sign for himself and for the other person, by signing both names."

In the present case the petition is not in the firm name; it is not in the names of all the members of the firm; nor does it purport to be signed on behalf of the firm or its members by the petitioner signatory. In my opinion this petition cannot be regarded either in form or in substance as a petition by the creditor-partners. It was consequently unsustainable and was rightly dismissed by the learned Subordinate Judge.

The conclusions I have come to render it unnecessary to discuss the argument which was addressed to me on the question whether the dismissal of the petitioner-creditor's interlocutory applica-

(7) [1888] 21 Q. B. D. 21=57 L. J. Q. B. 487=59 L. T. 253=36 W. R. 846=5 Morrell. 152.

(8) [1916] 33 I. C. 357.

(9) A. I. R. 1915 Mad. 424=25 I. C. 945.

(10) [1917] 40 I. C. 103.

(11) [1915] 28 I. C. 210.

(12) [1892] 65 L. T. 144.

tion in December to have Vaithinathier made a party was conclusive of this question, there having been no appeal from the order made on that application.

The result is that the civil revision petition will be allowed with costs here and in the lower appellate Court, and the order of the Subordinate Judge dismissing the insolvency petition will be restored.

P.R.S./B.V.

Revision allowed.

A. I. R. 1932 Madras 115

REILLY AND ANANTAKRISHNA AYYAR, JJ.

Viswanatha Ayyar—Appellant.

v.

Chimmukutti Amma and others—Respondents.

Letters Patent Appeal No. 135 of 1926, Decided on 24th July 1931, against decree of Spencer, J., in Second Appeal No. 892 of 1923, reported in *A. I. R. 1926 Mad. 650*.

(a) Mortgage — Sub-mortgage — Submortgagee, left out of redemption suit cannot afterwards bring what was mortgaged to him to sale.

If a mortgagor without notice of any sub-mortgage pays off his mortgagee out of Court, the submortgagee cannot after that redemption bring the right mortgaged to him to sale: 18 *M. L. J.* 462; 37 *I. C.* 778; 29 *Bom.* 199 and *A. I. R. 1928 Rang. 30, Ref.* [P 116 C 1]

A submortgagee left out of a redemption suit against his mortgagor, which ends in redemption cannot claim afterwards to bring either the property originally mortgaged to his mortgagor or what was mortgaged to himself to sale. There is a distinction between the position of a puisne mortgagee and a submortgagee in that respect. A puisne mortgagee obtains an interest in the property originally mortgaged; and every puisne mortgagee in his turn has a right to have his claim satisfied out of the property originally mortgaged until it is exhausted. A submortgagee has no direct interest in the property originally mortgaged by his mortgagor's mortgagor. He has only an interest in the mortgage right obtained by his mortgagor—a right which he knows is terminable—and, when that right has been legally terminated, his security so far is gone. A mortgagor cannot be allowed by redeeming some of his mortgagees to defeat others; but, when a mortgagor wishes to exercise his legal right to redeem a mortgage created by him, he cannot be obstructed or delayed by the existence of a submortgage of which he has never had knowledge or notice. We are certainly not at liberty to allow new obstacles to be invented in the way of redemption. [P 117 C 2]

(b) Civil P. C. (1908), O. 34, R. 1—If proper party in mortgage suit is omitted, his right to pursue his own remedy is not affected by that suit.

It is not correct to say that when one of the proper parties to a mortgage suit is not impleaded, the suit should be treated as if it had never

been or as if the decision between the parties to the suit as it stood could be wiped out or that the hands of the clock should be put back or that necessarily the omitted party must get all that he would have got in that suit. If a proper party in a mortgage suit is omitted, then his rights are not affected by that suit in the sense that he can still pursue his own remedy: *A. I. R. 1922 P. C. 11*; 9 *I. C.* 513 and 40 *Mad. 77, Ref.* [P 116 C 2]

(c) Civil P. C. (1908), O. 21, R. 2—Parties settling payment and reporting to Court—Decree does not stand—Mortgage.

If after a preliminary decree the mortgagor alleges that he has paid the amount due from him out of Court and the mortgagee disputes it, the Court will not recognize a payment not made in accordance with the directions of the decree into Court. But that can in no way affect the right of the mortgagor and the mortgagee to settle between themselves out of Court and report the matter to the Court. If they are in agreement and bring the payment to the notice of the Court, it is surely absurd for the Court to take up the position that the preliminary decree still stands and can be pursued, although the parties do not wish it to be done. Certainly that cannot be done at the instance of a third party not impleaded in the suit. [P 119 C 1]

K. P. Ramakrishna Ayyar—for Appellant.

K. P. Raman Menon—for Respondents.

Reilly, J.—The predecessor of defendant 5 in this case, the janmi of the land concerned, granted a kanam to defendants 1 and 2. They granted a sub-mortgage of that kanam to defendants 3 and 4, who assigned their right to the plaintiff. After that, on the expiry of the term of the kanam, defendant 5 sued for redemption without making the plaintiff or his assignors, defendants 3 and 4, parties to the suit, obtained a preliminary decree for redemption and settled with the kanamdars, defendants 1 and 2, by payment out of Court. The plaintiff has brought this suit to enforce his sub-mortgage by sale of the kanam right, which had been mortgaged to his assignors. The District Munsif gave him a personal decree against his mortgagors and a decree for the sale of their possessory right in the land concerned, whatever that might be. The plaintiff appealed to the Subordinate Judge claiming a decree for sale of the kanam; but his appeal was dismissed. He then appealed to this Court, and the second appeal was dismissed by Spencer, J. The present appeal is against Spencer, J.'s decision.

I have mentioned that defendant 5 paid defendants 1 and 2 the amount fixed in his redemption decree. It has been suggested before us in the course of the

arguments by Mr. Ramakrishna Ayyar for the plaintiff that the evidence of that payment is unsatisfactory. But the payment was found by the District Munsif to have been made; the Subordinate Judge's judgment obviously proceeds on the ground that that finding is correct; Spencer, J., accepted it as correct; and I do not see how we can allow that finding of fact to be questioned at this stage. The District Munsif found that neither defendant 5 nor his predecessor ever had actual notice of the plaintiff's submortgage and that finding is not now contested. It cannot be disputed that on the authorities, if a mortgagor without notice of any submortgage pays off his mortgagee out of Court, the submortgagee cannot after that redemption bring the right mortgaged to him to sale. For that we have *Narayana Mudali v. Raghavammal* (1), *Chinnaswamy v. Venkataramakrishnayya* (2), *Sahadev Ravji v. Shekh Papa Miya* (3) and *Maunq Shan Hpyu v. U Po Thaw* (4). Those were all cases in which the redemption proceeded out of Court. In this case, as I have mentioned, defendant 5 brought his suit for redemption, and it was in the course of that suit that he made his payment. Mr. Ramakrishna Ayyar has contended that that makes a vital difference in the matter. Under R. 1, O. 34, Civil P. C., the plaintiff, a submortgagee, as a person interested in the mortgage security, should have been made a party to defendant 5's suit. Mr. Ramakrishna Ayyar contends that, as he was not made a party, the payment in his absence did not discharge the mortgage to defendants 1 and 2, which is still available to the plaintiff. He has relied upon certain expressions in the judgment of their Lordships of the Privy Council in *Shukhi v. Ghulam Safdar Khan* (5). Their Lordships there quote with approval as a correct statement the following sentences from the judgment of the High Court in the case:

"The plaintiff is a puisne mortgagee seeking to enforce her mortgage, the prior mortgagee in his suit having failed to make her a party. It is the duty of the Court to give the plaintiff the opportunity of occupying the position which

she would have occupied if she had been made a party to the former suit."

Mr. Ramakrishna Ayyar would have us interpret that as meaning that we must put the plaintiff in this case into the position in which he would have been if he had been made a party to defendant 5's redemption suit and that he must now get what he would have got in that suit. But I do not think that their Lordships, in quoting those expressions, meant to lay down that, when one of the proper parties to a mortgage suit was not impleaded, the suit should be treated as if it had never been or as if the decision between the parties to the suit as it stood could be wiped out or that the hands of the clock should be put back or that necessarily the omitted party must get all that he would have got in that suit. It has been decided that, if a proper party in a mortgage suit is omitted, then his rights are not affected by that suit in the sense that he can still pursue his own remedy. That is so on general principles and is made clear in *Mulla Vittil Seethi v. Achuthan Nair* (6) and *Chinnu Pillai v. Venkatasamy Chettiar* (7). In this case the plaintiff, as the submortgagee, had a right to sue for sale of the property mortgaged to him. If he was not made a party to defendant 5's suit, his right to bring his own suit was unaffected and could be pursued by him. But if he brought such a suit what would he get? All he could get would be a decree for sale of the mortgage right which was mortgaged to him and, if necessary and available, in due course a personal decree against his mortgagors. It happens that in consequence of the redemption of the land mortgaged it is of no use to the plaintiff to bring that mortgage to sale. It is gone; and therefore all that remains to him is a personal decree against his mortgagors, to which the District Munsif has added a decree for sale of their possessory right, if any.

But Mr. Ramakrishna Ayyar has also contended that *Sukhi v. Ghulam Safdar Khan* (5) is a direct decision that a simple submortgagee left out of a mortgage suit to which his mortgagor is a party can in all cases afterwards enforce his mortgage by sale. I think it is clearly a mistake to suppose that *Sukhi v.*

(1) [1903] 18 M. L. J. 462.

(2) [1917] 37 I. C. 778.

(3) [1905] 29 Bom. 199=6 Bom. L. R. 836.

(4) A. I. R. 1928 Rang. 30=105 I. C. 474=5 Rang. 749.

(5) A. I. R. 1922 P. C. 11=65 I. C. 151=48 I. A. 465=43 All. 469 (P.C.).

(6) [1913] 9 I. C. 513.

(7) [1917] 40 Mad. 77=34 I. C. 507.

Ghulam Safdar Khan (5) was a case dealing with a submortgagee. In that case the first mortgagee brought a suit for sale of his mortgage without impleading the second mortgagee, got a decree, brought the property to sale and bought it himself. He died, bequeathing what he got by that purchase to his widow, and she gave it to secure certain annual payments to her for maintenance. After that the second mortgagee brought a suit for foreclosure against the nephews omitting to make the widow a party. He got a decree for foreclosure and paid the nephews about Rs. 3,000 claimed by them under the first mortgage, which they put forward as a shield against the second mortgagee. The second mortgagee then got possession of the property. In the suit which came before the Privy Council the widow sued for sale and she eventually got a decree for sale for the realization of the amount of Rs. 3,000, which had been paid by the second mortgagee on the first mortgage on the ground that the nephews had derogated from the right mortgaged to her to that extent. But it was also provided that if she wanted a decree to recover by sale any further amount on her mortgage, she must pay off the second mortgagee. On these facts, I think it is quite clear that the widow was not, as Mr. Ramakrishna Ayyar suggested, a submortgagee.

What was mortgaged to her was what her husband, the first mortgagee, had got in his sale, i., e. the whole interest in the property to the extent of the equity of redemption and his own mortgage but excluding the interest represented by the second mortgage. Their Lordships, while quoting from the judgment of the High Court a statement which they say is correct, quote her description as a puisne mortgagee, as otherwise she would not have been postponed to the second mortgagee. The case is therefore no authority for the proposition that a submortgagee left out of a redemption suit against his mortgagor which ends in redemption can claim afterwards to bring either the property originally mortgaged to his mortgagor or what was mortgaged to himself to sale. It is a fact as mentioned by Spencer, J., in his judgment that Madhavan Nair, J., in Second Appeal No. 668 of 1921 relied upon this judg-

ment of the Privy Council in deciding in favour of a submortgagee in those circumstances. I think it is quite clear that Madhavan Nair, J., realized that the case with which the Privy Council were dealing in *Sukhi v. Ghulam Sardar Khan* (5) was a puisne mortgagee's case, not a submortgagee's case as has been suggested. But he regarded it as applicable to a submortgagee's case. With respect I may perhaps point out that on a reference to the papers it appears that the case before Madhavan Nair, J., himself was not merely a submortgagee's case; it was a case of a puisne mortgagee also and therefore there is no doubt that the Allahabad case was applicable to it. But that case in my opinion is no authority for giving a submortgagee a right which is claimed for him in this case. In *Muhammad Haji v. Moidin Kutti* (8) a Bench of this Court decided that a submortgagee left out of a redemption suit against his mortgagor after redemption had been effected could not enforce his submortgage. And I think it is quite easy to see that on principle there is a distinction between the position of a puisne mortgagee and a submortgagee in that respect. A puisne mortgagee obtains an interest in the property originally mortgaged and every puisne mortgagee in his turn has a right to have his claim satisfied out of the property originally mortgaged until it is exhausted. A submortgagee has no direct interest in the property originally mortgaged by his mortgagor's mortgagor. He has only an interest in the mortgage right obtained by his mortgagor a right which he knows is terminable and when that right has been legally terminated his security so far is gone. A mortgagor cannot be allowed by redeeming some of his mortgagees to defect others but when a mortgagor wishes to exercise his legal right to redeem a mortgage created by him, he cannot be obstructed or delayed by the existence of a submortgage of which he has never had knowledge or notice. We are certainly not at liberty to allow new obstacles to be invented in the way of redemption.

So far I have been dealing with the case as if defendant 5 had no knowledge nor notice of the plaintiff's submort-

(8) A. I. R. 1921 Mad. 374=63 I. C. 192.

gage. Mr. Ramakrishna Ayyar has raised a contention that though defendant 5 had no actual knowledge of the submortgage, he had constructive notice of it. It is not suggested that the plaintiff was in possession of the property or that he had the kanam-deed in his possession when defendant 5 came to pay off the mortgage. Constructive notice is not suggested in either of those ways. But it is contended that, when defendant 5 brought his suit for redemption, it was his duty under R. 1, O. 34, Civil P. C., to bring before the Court all the parties interested in the mortgage security; and in order to perform that duty he ought to have searched the records of the Registration Department, and, if he had done so, he would have discovered the plaintiff's submortgage. It cannot be contended in a case like this that the registration of the submortgage itself was notice. That is not the law as it was at the time of defendant 5's suit nor is it even the law as altered by the recent amendment of the Transfer of Property Act. And the cases I have quoted *Narayana Mudali v. Raghavammal* (1) and *Chinnaswamy v. Venkataramakrishnayya* (2), *Sahadev Ravji v. Shekh Papa Miya* (3) and *Maung Shan Hoya v. U Po Thaw* (4), would all have been wrong if registration of the submortgage was itself notice. But the contention is that defendant 5, if he was to perform his duty to the Court, would have been bound to search the records of the Registration Department in order to find out who were the parties interested in the mortgage security so as to make the array of defendants in his suit complete. As Mr. Ramakrishna Ayyar has urged in *Tilakdhari Lal v. Khedan Lal* (9) their Lordships of the Privy Council in discussing the duty of a plaintiff under S. 85, T. P. Act, before the present Civil Procedure Code came into force, to bring before the Court in a mortgage suit all the parties interested in the property say:

"In order to discharge that duty the plaintiff was bound to search the register, and his omission to do so would be presumed to have been a wilful abstention from the search or gross negligence; and in either case he would be deemed to have had notice of the fact that

he would have discovered if the search had been made."

Those remarks appear to be equally applicable to the duty of a plaintiff in a mortgage suit under R. 1, O. 34 of the Code; and in that sense I do not see how we can escape the result that defendant 5, when he brought his suit, must have had constructive notice of the plaintiff's submortgage. But what is the result of that? Defendant 5 did not perform the duty to the Court which should have been performed. He might have been penalized in various ways for that. Anything that was done in the suit in the absence of the plaintiff would not prevent the plaintiff from pursuing his own remedy as he might be advised. But can that affect the legal result of defendant 5's redemption suit between the parties to it? The suit was not altogether ineffective because the plaintiff was not made a party to it. We cannot wipe out that suit; we cannot pretend that it was never heard and decided; we must respect its legal effect; and as between defendant 5 and his mortgagees, defendants 1 and 2, the legal effect of what happened in that suit is that their kanam was redeemed and, so far as they are concerned, is gone for ever. The plaintiff had only a mortgage right over that kanam, and, if the kanam is gone, then the whole foundation of his suit, so far as it is for sale, is gone too. In spite of the fact that in accordance with a very long course of decisions payment out of Court in redemption by a mortgagor to his mortgagee with the knowledge that there is a submortgagee who is not satisfied cannot affect the submortgagee's right, as in this case the mortgage has been redeemed in accordance with the decree of the Court, we cannot turn the clock back and pretend for the benefit of the plaintiff or anyone else that that has not happened. That is in effect the way in which the question was dealt with in *Muhammad Haji v. Moidin Kutti* (8), and with respect I think that that is the way to look at it.

There was one other contention raised by Mr. Ramakrishna Ayyar on the ground that the payment in this case was admittedly made by defendant 5 to defendants 1 and 2 after the preliminary decree in the redemption suit but not into Court. The payment was made out

(9) A. I. R. 1924 P. C. 112=57 I. C. 465=48 Cal. 1=47 I. A. 239 (P.C.).

of Court and was reported to the Court. He contends that, after a preliminary mortgage-decree is made directing payment of an amount into Court such and such results follow, but no payment out of Court has any valid effect. For that he relies upon *Singa Raja v. Pethu Raja* (10). What was decided in that case was that, if after a preliminary decree the mortgagor alleges that he has paid the amount due from him out of Court and the mortgagee disputes it, the Court will not recognize a payment not made in accordance with the directions of the decree into Court. But that can in no way affect the right of the mortgagor and the mortgagee to settle between themselves out of Court and report the matter to the Court. If they are in agreement and bring the payment to the notice of the Court, it is surely absurd for the Court to take up the position that the preliminary decree still stands and can be pursued, although the parties do not wish it to be done. Certainly that cannot be done at the instance of a third party not impleaded in the suit.

I may add in conclusion that this case has been argued before us as one of a mortgage and a submortgage. The mortgage is a kanam, and a kanam is not a mortgage only; it is also a lease. But throughout these proceedings in all the Courts the case appears to have been treated as one of mortgage, and in that way I have dealt with it. If it were treated as a case, not of a submortgage of a mortgage right, but of a mortgage of a leasehold right, still more if it were treated as a case of a mortgage of a kanam tenure under the new Malabar Tenancy Act, other considerations might arise. But I do not think that we ought to go into those aspects of the matter on the present occasion in view of the way in which the case has been treated in all the Courts.

In my opinion all the appellant's contentions fail, and this appeal should be dismissed with costs.

Anantakrishna Ayyar, J.—I agree.

P.R.S./K.N.

Appeal dismissed.

(10) [1919] 42 Mad. 61=48 I. C. 196.

***A. I. R. 1932 Madras 119**

WALLER AND PANDALAI, JJ.

(*Yanati*) *Venkataramamma*—Defendant—Appellant.

v.

(*Byrisetty*) *Singarayya Setty and others*—Plaintiffs—Respondents.

Appeal No. 364 of 1927, Decided on 21st July 1931, against order of Dist. Judge, Nellore, D/- 15th September 1927, in E. A. No. 191 of 1927 and O. S. No. 56 of 1925

*Civil P. C. (1908), O. 21, R. 66 (e)—Court is justified in giving information material for judging nature and value of property.

Where the Court thinks fit that it is material for the intending buyers to know that the property to be sold is under litigation and directs the amin to give them that information it is entirely justified in doing so; 41 *Mad.* 985, *Diss. from.* [F 119 C 2]

P. Venkataramana Rao—for Appellant.

M. Ramachandra Rao—for Respondents.

Judgment.—This is an appeal against an order refusing to set aside a sale in execution. Only two of the grounds urged before the lower Court are pressed here. The first is that bidders were scared away by a notification issued at the sale itself, warning them that the appellant's daughter's claim to the property had been dismissed and that she had filed a suit. Reliance is placed on some observations by Seshagiri Iyer, J., in *Venkataramatnam v. Ranganayakamma* (1) at 997 on the undesirability of issuing such warnings. With great respect we must express our dissent. R. 66 (2) (e), O. 21, Civil P. C., directs the Court to specify;

"every other thing which the Court considers material for a purchaser to know in order to judge the nature and value of the property."

In this instance, the Court thought that it was material for intending buyers to know that the property was under litigation and directed the amin to give them that information and we think that it was entirely justified in doing so. Nor does the complaint come very well from the appellant, for it seems tolerably obvious that it is she that is responsible for her daughter's effort to defeat or delay the decree and the sale under it.

The next complaint is that the sale was illegal as it was adjourned for over seven days. What happened was that the sale went on from day to day continuously from 18th to 29th April which was neither illegal nor irregular. It was

(1) [1918] 41 *Mad.* 985=48 I. C. 270 (F. B.).

not adjourned in the proper sense of the word. The Judge was no doubt absent for three days while the sale was going on, but it appears that he had issued a general order that all sales were to continue till his return.

We find on both points against the appellant. Assuming that there had been irregularities, it is for her to show that they caused her substantial injury. She complains that land worth Rs. 40,000 was sold for Rs. 6,000 odd. On the evidence, no doubt, it appears that the land might have been worth about Rs. 40,000 had the title been clear; but what was the position? The appellant's daughter had filed a suit claiming the property. The appellant was supporting her by admitting that her own title was defective. She had, further, before the sale, alienated nearly one third of the property to two of her relations. Under the circumstances, if it fetched much less than its value, the fault would appear to be her own and no one else's. We dismiss the appeal with costs.

P.R.S./R.M.

Appeal dismissed.

A. I. R. 1932 Madras 120

REILLY AND ANANTAKRISHNA
AYYAR, JJ.

Vijiaraghava Pillai—Appellant.

v.

Ponnammal and others—Respondents.

Letters Patent Appeal No. 68 of 1927, Decided on 22nd September 1931, against decision of Odgers, J., D/- 2nd September 1926, in Second Appeal No. 182 of 1924.

(a) Hindu Law—Widow—Nature of estate explained.

It is well-known that a Hindu widow's estate in her husband's property is in some ways more than a life estate. But it is not an estate for life; it is an estate which determines either by her death or by her remarriage or by surrender.

[P 121 C 1]

(b) Hindu Law — Alienation — Widow—Widow cannot defeat same by subsequent surrender.

It is well settled that a widow cannot alienate her interest in her husband's estate and then defeat that alienation by surrendering her interest in the estate to the next reversioner: 39 *Mad.* 1035; *A. I. R.* 1925 *Mad.* 1267 and *A. I. R.* 1915 *Mad.* 656, *Foll.*

[P 121 C 1]

(c) Hindu Widows' Remarriage Act (1856), S. 2—On remarriage husband's reversioners succeed to his property unaffected by her alienations not binding on husband's estate.

On their face the words in S. 2 "as if she had then died" appear to indicate that the intention of the legislature was that the same consequences should follow on her remarriage as would

follow on her death. The word "thereupon" in S. 2 means "on her remarriage." The words "the property" mentioned in the concluding words of the section, must mean her deceased husband's property. The words "the same" clearly and grammatically mean "the property" which is just previously mentioned. The effect of the section is this—that on the remarriage of the widow the next heirs shall succeed to the husband's property unaffected by any alienation which the widow could make but which would bind not the husband's estate but only her own interest in it. The intention of the section is that a Hindu widow who marries a second time shall no longer derive any benefit from her first husband's estate but that the benefit of that estate shall go to the next reversioner. Therefore an alienation made by a widow of her husband's estate not for necessity binding on that estate has no effect against the reversioners from the moment she marries a second time: (*Case law discussed*)

[P 122 C 1 2]

Anantakrishna Ayyar, J.—The word "thereupon" occurring in the section would seem to point out that the object of the legislature was to affect only such rights of inheritance as had already opened, and not future rights of inheritance.

[P 124 C 1]

(d) Interpretation of Statutes—Exceptions.

Exceptions should not be enlarged in their scope more than what their wordings properly justify.

[P 123 C 2]

T. M. Krishnaswamy Ayyar and *T. E. Ramabhadrachariar*—for Appellant.

M. S. Venkatarama Ayyar, and *N. S. Srinivasa Ayyar* and *G. Jagadisa Iyer*—for Respondents.

Reilly, J.—In this case the plaintiff sued to recover possession of the land in question as purchaser from Ponnammal, whose interest in it was as widow of one Poongavana Gowndan. It is admitted that his purchase was only of the widow's interest and could not bind the husband's estate. After the date of the plaintiff's sale-deed Ponnammal married again. Defendant 2, who is Poongavana Gowndan's mother, contended that on Ponnammal's remarriage the reversion to Poongavana Gowndan's estate fell in to her and that the plaintiff's purchase was no longer of any effect. She and her alienee, Defendant 4, contested the suit. The District Munsif made a decree for the plaintiff; but on appeal that was reversed by the Subordinate Judge, who found as a fact that Ponnammal had married again after her sale to the plaintiff, disagreeing on that point with the District Munsif. There was a second appeal to this Court, which was disposed of by Odgers, J., as involving only a question of fact and therefore

dismissed. The present appeal is against that decision.

It is urged for the plaintiff, who is the appellant here, that Ponnammal's remarriage did not put an end to his rights in virtue of his purchase and that his rights continue until Ponnammal's death. It is not disputed that in the caste to which Ponnammal belongs remarriage of widows is permitted by custom, and the fact that Ponnammal married a second husband after her sale to the plaintiff cannot now be disputed. Nor is it disputed for the plaintiff that Ponnammal's interest in her first husband's estate as his widow would ordinarily come to an end with her remarriage as with her death, but to that an exception is urged, viz., that her second marriage could not affect the plaintiff's rights as purchaser from her so as to cut them short before her death. It is well known that a Hindu widow's estate in her husband's property is in some ways more than a life estate. But it is not an estate for life: it is an estate which determines either by her death or by her remarriage or by surrender. Mr. Krishnaswami Ayyar for the plaintiff has urged before us that, if a widow's estate comes to an end by remarriage, then that does not affect the rights of an alienee from her until her death any more than the surrender of her estate could do so. He asks us to apply to this case the analogy of a widow's surrender of her estate to the next reversioner. There is no question that, so far as this Court is concerned, it is well settled that a widow cannot alienate her interest in her husband's estate and then defeat that alienation by surrendering her interest in the estate to the next reversioner: *Subbamma v. Subramanyam* (1), *Sundarasiva Rao v. Viyanna* (2), and *Singaram Chettiar v. Kalyanasundaram Pillai* (3). Mr. Krishnaswami Ayyar asks us to say that, if a widow cannot defeat her alienee by surrendering her estate to the next reversioner, likewise she cannot defeat her alienee by marrying a second time. I think that this argument from analogy is very unsafe. There are obvious distinctions between the position of a surrendering widow and

of a remarrying widow. A widow who surrenders her interest in her husband's estate to the next reversioner is nonetheless his widow; she remains a member of his family. But a widow who marries a second time is no longer in effect the widow of her first husband; she has left his family finally; she has become a member of another family. And we must remember, as has often been pointed out, that the right of a widow to surrender her interest in her husband's estate to the next reversioner depends upon judicial decisions, and Courts in adopting and approving and enforcing the results of such surrenders have felt it necessary to guard against this development of the law being put to fraudulent uses. They have felt it necessary to lay down that a widow cannot alienate her interest one day and take the proceeds, and next day in collusion with the reversioner surrender her interest to him and so defeat her alienation. It is necessary that Courts should not follow a development of the law to which they have given countenance to be turned into an instrument of fraud. But the remarriage of Hindu widows and its incidents are matters of custom or of legislation; and the Courts have no power to restrict such rights of remarriage or the incidents of remarriage or to qualify them in any way. Moreover, as Mr. Venkatarama Ayyar has pointed out, it is one thing to say that a widow shall not be allowed by her surrender to cut short the effect of a grant which she has herself made within her powers, and quite another thing to say that, when her own estate has come to an end by remarriage, nevertheless something which she has carved out of that estate by grant shall somehow be prolonged for a further period. In my opinion this supposed analogy between a surrendering widow and a remarrying widow is of very little help to us.

It is better for us to turn to the language of S. 2, Hindu Widows' Remarriage Act, which Mr. Krishnaswami Ayyar admits, covers this case, although this is a case where a widow could remarry by the custom of her caste. I agree with Mr. Krishnaswami Ayyar, that we must be very careful in interpreting that section, not only because it imposes a forfeiture, but also because it is in itself an exception to the more general

(1) [1916] 39 Mad. 1035=32 I. C. 813.

(2) A. I. R. 1925 Mad. 1267=91 I. C. 401=48 Mad. 933.

(3) A. I. R. 1915 Mad. 656=26 I. C. 1.

rule laid down in S. 5 of the Act. S. 2 provides :

"All rights and interests which any widow may have in her deceased husband's property by way of maintenance or by inheritance to her husband shall upon her remarriage cease and determine as if she had then died."

Now on their face the words "as if she had then died" appear to indicate that the intention of the legislature was that the same consequence should follow on her remarriage as would follow on her death. It cannot be denied that on the death of Ponnammal, if she had not remarried, such an alienation as the one she made in favour of the plaintiff would have no longer any effect against contesting reversioners. But Mr. Krishnaswami Ayyar has laid stress upon the fact that the words in that section are : "any rights or interests which the widow may have in her deceased husband's property," not "any rights which she may have or may have had ;" and he contends that the section means that the only rights affected are those rights which a widow still has at the time of her second marriage and that they do not include any rights which she has alienated before her remarriage. Grammatically I think it is possible to put that interpretation on that part of the section as it stands; but, when we are interpreting a section, we must be careful to read the whole of it. The concluding words of the section are to my mind very enlightening on this point. They are :

"and the next heirs of her deceased husband or other persons entitled to the property on her death shall thereupon succeed to the same"

'thereupon' in this connexion meaning 'on her remarriage.' Now "the property" mentioned in these concluding words of the section, must mean her deceased husband's property. That I think is incontestable. The conclusion of the section is that the next heirs "shall thereupon succeed to the same." The words "the same" I think clearly and grammatically mean "the property," which is just previously mentioned. The effect of the section is this: that on the remarriage of the widow the next heirs shall succeed to the husband's property unaffected by any alienation which the widow could make but which would bind not the husband's estate but only her own interest in it. When we examine the whole section carefully I do not think it is possible to put upon it the construction which

Mr. Krishnaswami Ayyar urges us to put on it. Nor do I think that we are assisted in the question before us in this case by any of the decisions to the effect that the section does not affect rights of inheritance which may come to the widow in future ; for instance any right of inheritance to her son after the date of her second marriage.

But, if there were any difficulty about the grammatical interpretation of the section, it would be justifiable for us to consider whether the interpretation, which Mr. Krishnaswami Ayyar would have us put upon it, that the second marriage of the widow does not itself have any effect upon alienations made by her before that marriage, is consistent with the policy of the section. Now I do not think it can be denied that the intention of the section is that a Hindu widow who marries a second time shall no longer derive any benefit from her first husband's estate but that the benefit of that estate shall go to the next reversioner. If we accepted Mr. Krishnaswami Ayyar's interpretation of the section, that intention could be most easily defeated. If a widow who had decided to marry a second time tomorrow could sell the whole of her interest in her first husband's estate to-day and take away the proceeds with her for her own benefit or that of her second husband, and her alienee could go on enjoying the first husband's property until her death, the object of the section would be entirely defeated. And we should get to the absurd position that the widow could create an estate for her alienee, which she herself could never have enjoyed, and that she could prolong that estate long after her own interest in her first husband's estate had finally determined. The interpretation proposed by Mr. Krishnaswami Ayyar, examined in that way, will be seen to make it possible that the section should be defeated and turned into absurdity.

But this is not a new question. We need not depend entirely upon our own views of the matter, though we have had the benefit of a long and interesting argument upon it. A Bench of this Court in *Muthu Naicken v. Srinivasa Ayyangar* (4) decided that an alienation made by a widow of her husband's estate not for necessity binding on that estate had

no effect against the reversioners from the moment she married a second time. That decision is I think binding upon us, and I cannot agree with Mr. Krishnaswami Ayyar that we are entitled to disregard it because there is no very elaborate discussion of S. 2, Hindu Widows' Remarriage Act, in it. That section is referred to by the learned Judges, and they obviously base their decision upon their interpretation of it. Mookerjee, J., in 1907, gave a similar decision in *Nityamadhava Das v. Srinath Chandra Chukarbutty* (5). The same view was expressed, no doubt obiter, by Bhashyam Ayyangar, J., in *Sreeramulu v. Krishtamma* (6). And it may also be noticed that in *Matungini Gupta v. Ram Rutton Roy* (7), Petheram, C. J., referred to the estate which a widow takes by inheritance from her husband as being determined by her re-marriage. Both reason and authority therefore appear to me to be against Mr. Krishnaswami Ayyar's contentions.

In my opinion the decree of the learned Subordinate Judge was correct, and this appeal should be dismissed with costs.

Anantakrishna Ayyar, J.—I agree. Though the learned Judge before whom the second appeal came on for hearing disposed of it by saying: "This is entirely a question of fact and there is no question of law," it is clear that an important question of law arises in the second appeal. The plaintiff as the purchaser from defendant 1, the widow of the last male owner, sued to recover possession of the properties in suit; defendant 2 is the mother of the last male owner, defendant 4 is the alienee from defendant 2, and defendant 3 is the grandmother of the last male owner. The question whether defendant 1 did in fact remarry or not is now set at rest by the finding arrived at by the lower appellate Court that she did remarry P. W. 5, though defendant 1 as well as P. W. 5 denied the factum of remarriage. We have got the evidence of P. W. 5 (the nat-tamaigar) on the side of the defendants which the lower appellate Court has believed, and I think that this question of remarriage should be taken to be concluded by that finding; and in fact the

learned advocate for the appellant seriously discussed only the question of law that arises on that finding.

The learned advocate for the appellant argued that on a proper construction of S. 2, Hindu Widows' Remarriage Act, a purchaser from such a widow before her re-marriage does not lose the rights in the life estate already conveyed by the widow so long as the widow is alive, even when, as here, the sale was not for purposes binding on the reversioners. Now the nature of a widows' estate under Hindu law has been described by the Privy Council in *Moni Ram Kelita v. Korikolitani* (8), at p. 789. It is a peculiar kind of estate not having any real analogy to estates known elsewhere. The learned advocate argued that in construing S. 2, it would be relevant to bear in mind the fact that this Court has held that after a sale of any property forming part of her husband's estate, if a Hindu widow should surrender her husband's estate to the next reversioner, then the rights of such transferee are not affected by the surrender, and he invited us to hold that the same should be the result when such a widow makes an alienation and then remarries. On the other hand the learned advocate for defendant 2 and her alienee invited to bear in mind the decision of the Full Bench of that Court in *Vaidyanatha Sastri v. Savithri Ammal* (9) where it was held that when, after an alienation by a widow, she adopts a son to her late husband, the adopted son is not bound by the alienation, unless the alienation be for purposes binding upon the last male-holder's estate, but could get possession from the alienee before the widow's death. For my part, I should like to approach the decision of this case by examining the wordings of the Hindu Widows' Remarriage Act. The first sentence of S. 5 enacts:

"Except as in the three preceding sections is provided, a widow shall not, by reason of her remarriage, forfeit any property or any right to which she would otherwise be entitled."

Section 2 is therefore an exception, and according to the ordinary rules of interpretation, exceptions should not be enlarged in their scope more than what their wordings properly justify. I agree with the learned advocate for the ap-

(5) [1908] 8 C. L. J. 542.

(6) [1908] 26 Mad. 143=12 M. L. J. 197.

(7) [1892] 19 Cal. 289.

(8) [1880] 5 Cal. 776=7 I. A. 115=8 C. L. R. 822 (P.C.).

(9) [1918] 41 Mad. 75=42 I. C. 245 (F.B.).

pellant so far. But when the learned advocate asks us to hold that the effect of S. 2 is to work a forfeiture only with reference to any property of her late husband which she may actually have in her possession at the time of the marriage, I think that the wordings of the section do not support such a contention. The first portion of the section refers to the rights and interests which a widow may have in her deceased husband's property, and provides that they shall determine upon her remarriage as if she had then died. Assuming that there would have been difficulty if the section had stopped there, we have got in the section further words which seem to me to lead strongly against the inference which the learned advocate for the appellant asked us to draw. They are

"and the next heirs of her deceased husband or other persons entitled to the property on her death shall thereupon succeed to the same."

It is therefore reasonably clear to my mind that what is forfeited upon her remarriage is the property of her deceased husband, that is, what is called the husband's estate. In cases where a portion of the property belonging to the husband's estate had been alienated for purposes binding upon the estate, we must take it that such alienated property no longer forms part of the estate. Having regard to the last portion of the section, I think that the reasonable inference to be drawn is that the widow on her remarriage forfeits all rights to the properties of her husband and that the next heirs of her deceased husband or other persons entitled to the property on her death shall thereupon succeed to the same. The learned advocate further argued that having regard to the decisions which held that a widow's future rights of inheritance are not in any way interfered with by S. 2, the construction suggested by the respondents' advocate is not tenable. I think that these decisions do not really help us in construing the section with reference to the property which really formed her husband's estate and to which she succeeded on her husband's death. The word "thereupon" occurring in the section would seem to point out that the object of the legislature was to affect only such rights of inheritance as had already opened, and not future rights of inheritance; and there-

fore these decisions do not really help us in the present case.

The question regarding the construction of this section does not arise for the first time now.

In *Sreeramulu v. Krishtamma* (6), at p. 155, the learned Judge, Mr. Bhashyam Ayyangar, construed the section in a way inconsistent with the construction sought to be put upon it by the learned advocate for the appellant. I also find that incidentally Kumaraswami Sastri, J., had also occasion to construe the general scope of the section. I find that in the case in *Vaidyanatha Sastri v. Savithri Ammal* (9) at p. 94, this is what the learned Judge says:

"I find it difficult to see how the purchaser from a Hindu widow who has only limited powers of alienation and who alienates property without any necessity or justifying circumstances such as would bind the reversioners after her death or her remarriage can invoke any principles of Hindu law or any equity to prevent etc."

Again, at p. 101, he says:

"It is difficult to see why a purchaser who purchases without any necessity for the sale and who knows that death or remarriage would put an end to her rights should be encouraged etc."

No doubt the learned Judges had not to decide any question directly arising out of S. 2, but I take these observations as helping me, to some extent, in my construction of S. 2 of the Act, and as showing how the learned Judges understood the section.

In *Nitya Mahadhar Das v. Srinath Chandra Chukerbutty* (5). Sir Ashutosh Mookerjee, J., of the Calcutta High Court has gone elaborately into the question and has construed that section; and with respect, I adopt his construction. In Allahabad it is true, as was pointed out by the learned advocate for the appellant the course of decisions would seem to be in favour of the construction he suggests. But in *Mula v. Partab* (10) the learned Chief Justice and Banerjee, J., as I understand their judgments, gave it as their opinion that but for the course of decisions in that Court they would not be prepared to adopt that construction. But there is something more direct than all the above, to help me in deciding this case, for in *Muthu Naicken v. Srinivasa Ayyangar* (4), a Bench of this Court had to decide exactly the very same question that we have to decide in this case. The learned Judges, Abdur Rahim and

Krishnaswamy Ayyar, JJ., No doubt I did not think it necessary to discuss the wording of S. 2 as elaborately as they would undoubtedly have otherwise done but for the fact that their attention was drawn to the case in *Nitya Mahadhava Das v. Srinath Chandra Chuckerbutty* (5) where the wordings of S. 2 were discussed by the learned Judge Mookerjee, J. of the Calcutta High Court, and their Lordships were content to refer to that case and adopt the reasoning contained therein. One thing that struck me in the course of the arguments advanced before us by the learned advocate for the appellant is this: Why should purchasers of properties from a widow be made to suffer in case of her remarriage more than in the case of a surrender by her subsequent to the alienation? The answer to that seems to be supplied by Kumaraswami Sastri, J., in the course of his judgment in *Vaidyanatha Sastri v. Savithri Ammal* (9). At p. 99, this is what the learned Judge says:

"Reference has been made to cases where it has been held that a reversioner to whom the widow surrenders the estate and thereby accelerates the succession cannot sue to set aside the alienation made by her till she dies. These cases have in my opinion no bearing or application to cases of adoption by the widow. The whole doctrine of surrender and consequent acceleration of the estate of the reversioners has no basis in Hindu Smritis but has been evolved by Courts of justice on general principles of jurisprudence. It is clear that the surrender by the widow and the acceptance of the estate by the reversioner are purely matter of contract."

The law of surrender, as administered by Court being thus the result of practically Judge-made law, and being also materially shaped by the principles of justice, equity and good conscience Courts have held that in deciding questions relating to surrender the principles of justice, equity and good conscience should be borne in mind. But I doubt whether that reasoning would apply to cases where a Hindu widow ceases to represent the estate of the last male-holder, her husband, by reason of her remarriage. If any analogy is permissible I am inclined to think it is the analogy of cases relating to adoption—where Courts have held that an alienation made by a widow, for purposes not binding on the estate, would not be binding on the adopted son, even though the adoption is made subsequent to such alienation and that the adopted son would at once be entitled to

possession of such property. But it is enough to state that in the case before us we are bound by the provisions of the statute, and having given my best consideration to the arguments advanced before us, I am of opinion that nothing material has been urged which would justify us in coming to a conclusion contrary to the decision in *Muthu Naickan v. Srinivasa Ayyangar* (4).

I agree with my learned brother that this Letters Patent Appeal should be dismissed with costs

P.R.S./B.V.

Appeal dismissed.

* A. I. R. 1932 Madras 125

RAMESAM AND VENKATASUBBA RAO, JJ.
(*Sree Rajah*) Vasi Reddi Srichandra Mouleswara Prasada Bahadur Zamin-dar Garu—Petitioner.

v.

Secy. of State and others—Respondents.

Civil Misc. Petns. Nos. 1338 to 1340 of 1929, Decided on 16th April 1931, Petitions for leave to appeal to His Majesty in Council against decision in A. S. Nos. 244 and 245 of 1922.

(a) Civil P. C. (1908), O. 45, R. 4—"Judgment" means judgment appealed against.

The word "judgment" in O. 45, R. 4, means the judgment appealed against and has nothing to do with the judgments of the Courts below: *A. I. R. 1921 Pat. 97, Ref.* [P 126 C 1]

*(b) Civil P. C. (1908), O. 45, R. 4—Spirit and not the letter of R. 4 should be observed—Separate judgments may be treated as one.

Where the two separate suits that are to be consolidated for purposes of valuation are not disposed of by the same judgment but have been decided by judgments that are almost identical, the High Court should look to the spirit and not to the letter of the rule and hence the separate judgments may be regarded as the same judgment: *A. I. R. 1927 Bom. 19, Foll.* [P 126 C 2]

(c) Civil P. C. (1908), O. 45, R. 4—Court-fee value is the least market value.

The defendant who adopts the plaintiff's value cannot prevent the appellant (plaintiff) from showing that the market value is higher than the court-fee value, but where the plaintiff wants to appeal and is content with the court-fee value, the defendant who adopts it for his own purposes cannot say that the real valuation is lower than the court-fee value. This is because the presumption in all such cases is that the court-fee value at least represents the minimum value, i. e., the court-fee value is the least possible market value: *6 I. C. 792, Rel. on; (Case law discussed).* [P 127 C 2]

*(d) Civil P. C. (1908), O. 45, R. 4—Possibility of similar litigation in same Presidency—Petitioner for consolidation cannot add this value unless other litigation is affected by *res judicata*.

The mere possibility of similar litigation in the same Presidency will not entitle the peti-

tioner for leave to consolidate suits for purposes of valuation to add to the value unless the other litigation will be affected by the doctrine of res judicata in which case it helps : *A. I. R. 1929 Mad. 780, Foll.* [P 128 C 2]

(e) **Civil P. C. (1908), O. 45, R. 4 — Discretion to be in applicant's favour.**

Unless sufficient grounds are shown, the Court would exercise its discretion in favour of the applicant. [P 128 C 2]

Advocate-General and P. Satyanarayana Rao—for Petitioner.

Govt. Pleader—for Respondent 1.

Ramesam, J.—Of the above petitions C. M. Ps. Nos. 1338 and 1339 of 1929 are applications for leave to appeal to the Privy Council against our judgments and decrees in A. S. Nos. 244 and 245 of 1922 respectively. C. M. P. No. 1340 of 1929 is an application under O. 45, R. 4, Civil P. C., for a consolidation of the other petitions for purposes of pecuniary valuation and hearing. It is convenient to take up the third petition in the first instance, as the disposal of the other two petitions depends upon the disposal of this to a certain extent. Under O. 45, R. 4, Civil P. C., we have power to consolidate the two suits for purposes of valuation, if they are decided by the same judgment. In the High Court they are undoubtedly decided by the same judgment, but it is objected by the learned Government Pleader that they were not decided by the same judgment in the lower Court and therefore O. 45, R. 4, does not apply. But in the first place I think the word "judgment" in O. 45, R. 4 means the judgment appealed against and has nothing to do with the judgments of the Courts below : vide *Deokinandan Prasad v. Narasingh Raut* (1). It is true that if this condition is satisfied, we consolidate not merely the appeals before us but all the proceedings in the suits. Moreover a comparison of the so-called separate judgment of the first Court shows that the second judgment in A. S. No. 245 is practically a copy of the first Court's judgment rewritten omitting a few sentences or paragraphs. Except that two sentences in sub-para. 3 of para. 2 are omitted and para. 4 (the summary of defendant 3's written statement which is unnecessary for the other cases) is also omitted, the judgment is identical up to para. 22. Para. 23 in the first case is not reproduced in the second case as it refers to a point which

does not arise in the second case. The rest of the judgment is again identical. In a matter of this kind we think we should look to the spirit of the rule and not the letter. This is the view taken by the learned Judges of the Bombay High Court in *Jivangiri v. Gajanan Narayan* (2) I think that the judgments of the lower Court must be regarded as the same judgment and therefore the objection of the learned Government Pleader is disallowed. We are prepared to consolidate the value of the suits if it is of any use to the petitioner.

This leads us to the next question whether even after the consolidation, the value of the two suits together exceeds Rs. 10,000. When these petitions came on for disposal before us last time, we called for a report from the Subordinate Judge of Bezwada as to the value of the lands now and at the time of the suits.

In the view I now take probably it would have been unnecessary to call for such a report as to the valuation of the lands at the time of the suit if an order was passed on the petition for consolidation. But at that time, we passed no orders on the petition for consolidation. We simply said we would call for a report and dispose of the petition after the report is received. The report of the Subordinate Judge now is that the value of the lands in the first suit is Rs. 3,954 and in the second suit Rs. 5,868 omitting annas and pies. These values together with the value of the mesne profits claimed by the plaintiff prior to the plaint will certainly make the value Rs. 10,000. But the value of the two suits at the time of the suit does not amount to Rs. 10,000 according to his present report. In the first case he found the value to be Rs. 3,217 and in the second case he found it to be Rupees 4,085. These two values with the amount of mesne profits claimed do not bring the value up to Rs. 10,000. It is claimed by the learned Advocate-General appearing for the petitioner that it is not open to the respondent to go below the value given to these suits in the plaint because he adopted those values for the purposes of choosing the forum for his appeal when he filed the appeals from the decision of the Subordinate Judge to the High Court. If the valuation of the two suits were less than Rs. 5,000, the Government's appeals

(1) *A. I. R. 1921 Pat. 97 = 60 I. C. 517 = 6 Pat. L. J. 97.*

(2) *A. I. R. 1927 Bom. 19 = 100 I. C. 143 = 50 Bom. 753.*

would lie in the District Court of Kistna and not in the High Court. It is only because the value of each of the two suits was more than Rs. 5,000 that the appeals lay to the High Court. The Government did not object to the valuation of the plaint in the written statement and adopting the value of the suits as valued by the plaint they filed appeals to the High Court. It is therefore contended by the learned Advocate-General that it is not open to him to say that the values were less. He relies on the decision of the Privy Council in *Kristo Indro Saha v. Huromonee Dassee* (3).

The learned Government Pleader seeks to distinguish this case on the ground that the principle mentioned therein, namely, that the opposite party when adopting the plaintiff's valuation cannot reprobate it afterwards applies only where the valuation of the plaint was a valuation based on the market value and not under the rules mentioned in the Court-fees Act. The decision in *Kristo Indro Saha v. Huromonee Dassee* (3) was followed by us in *Chelasani Ratayya v. Anno Brahmayya* (4) and also in *M. Venkatarayudu v. M. Venkanna* (5). But these decisions do not help us to decide the distinction now drawn by the learned Government Pleader. This principle was applied by Sir Lawrence Jenkins, C. J., in another case in *Kumar Basanta Kumar Roy v. Secretary of State* (6).

The learned Advocate-General points out in reply to the Government Pleader that in the case in *Kristo Indro Saha v. Huromonee Dassee* (3) the valuation made by the plaintiff which the defendant had adopted for his appeal and which afterwards was opposed by very strong affidavits was itself a court-fee valuation of 15 times the profits of the land and the Court-fees Act then in force is the same as the Court-fees Act in force now. But this aspect of the question was not discussed or dealt with by the learned Judges who disposed of the petition. But we cannot assume that the aspect was not present in the minds of their Lordships. About the same time the same Lordships of the Privy Council disposed of

another case on a similar question in *Baboo Lakraj Roy v. Kanhya Singh* (7). The interval between the two judgments is five months. In the second case it was held that a party is not precluded from showing that the market value is higher than the court-fee valuation which he adopts for purposes of stamp duty. These two cases together were discussed by Sir Lawrence Jenkins C. J. in the Calcutta case already referred to; *Kumara Basanta Kumar Roy v. Secretary of State* (6). At p. 873 his Lordship observes:

"But this involves no conflict of opinion; indeed it may be pointed out that in both the cases I have mentioned the judgment was delivered by Sir James Colville and the members of the Board were the same. And the distinction is obvious; for in the earlier case the endeavour was to lower the value of the subject-matter and this was made by one who had adopted it for the purpose of the previous appeal preferred by him so that the principle that a party cannot approbate and reprobate governed. In the other cases which are collected in *Hari Mohan Misser v. Surendra Narain Singh* (8) the endeavour was to raise the value and this was made in circumstances where that principle could not be invoked. I therefore hold that we must take the value of the property as that laid in the plaint and adopted by the reports for the purposes of the appeal to this Court."

As I understand his Lordship's judgment the defendant who adopted the plaintiff's value cannot prevent the appellant from showing that the market value is higher than the court-fee value but where the plaintiff wants to appeal and is content with the court-fee value the defendant who adopted it for his own purposes cannot say the real valuation is lower than the court-fee value. The real reason behind this seems to be this: that the methods of valuation adopted in the Court-fees Act, 1870, really represented the modes of estimating the minimum value of the lands. It is not that the valuation of the subject-matter as mentioned in S. 7, Cl. 5, does not represent anything connected with the value of the land. It did represent the minimum value of the land. After the lapse of 30 or 40 years the value of the lands has considerably increased. Now the lands are worth far more than the value adopted on the principles of the Court-fees Act. That being the case it is inconceivable in these days to get a case where the Court-fee value should be more than the mar-

(3) [1875] 1 L. A. 84=3 Sar. 317 (P. C.).

(4) A. I. R. 1925 Mad. 1223=91 L. C. 572.

(5) A. I. R. 1927 Mad. 862=104 L. C. 577.

(6) [1910] 6 L. C. 792.

(7) [1873] 1 L. A. 317=3 Sar. 373 (P. C.).

(8) [1904] 31 Cal. 301.

ket value. The court-fee value generally is far below the market value. The Court-fees Act is intended to give the benefit of a lower valuation for the purpose of court-fees. But where the definite rules are not available the residuary clause refers the party to market value. Seeing it is not human nature to value the subject-matter of a suit at a value higher than its real value it is not easy to imagine that the plaintiff has over-valued the lands in this case solely by anticipating the difficulty which has now arisen. The presumption therefore in all such cases is that the court-fee value at least represents the minimum value. The presumption becomes very strong where the other party adopts it and uses it because both parties would then have acquiesced in that value. It is said it is not open to one party afterwards to argue that the real value of the land is less than the court-fee value given by one and adopted by the other. If this is really the reason underlying the decision from *Kristo Indro Saha v. Huromonee Dassee* (3), onwards it seems to me that we ought to adopt that the value of the suit lands is at least the court-fee value given in the plaint for the purposes of court-fee. By so saying I do not mean that the market value is not to be looked to. The rule laid down in such a manner only means this that the court-fee value is the least possible market value and it is safe to adopt it for our purposes. In this view it is unnecessary to go into the reasons given by the Subordinate Judge for his valuation of the lands at the time of the suit.

It is also contended by the learned Advocate-General appearing for the petitioner that indirectly the question at issue involves the interests of larger value than Rs. 10,000. The substantial question of law in this case is what are the lands excluded from a zamindari at the time of the permanent settlement by reason of the terms in the Sadarwari Istimirari the terms of which are also embodied in the Permanent Regulation S. 4. The affidavit of the petitioner discloses that there are other suits concerning the resumption of service inam lands in the plaintiff's zamindari which are now pending in the High Court in 19 second appeals and the value of these cases undoubtedly if added to the present makes the subject-matter of the dispute

much more than Rs. 10,000. We explained the meaning of the word "indirectly" in S. 110 in *Secy. of State v. Subbarayudu* (9). Myself and Kumaraswami Sastri, J. also adopted that view in C. M. P. No. 793 of 1929 cited in *Secy. of State v. Subbarayudu* (9). There we said that the mere possibility of similar litigation in this Presidency will not entitle the petitioner in this case to add to the value unless the other litigation will be affected by the doctrine of *res judicata* in which case it helps. Adopting that test we think that this is another reason why the value of these petitions must be held to be more than Rs. 10,000. For all these reasons I would grant leave. Consolidation of the appeals is ordered.

Venkatasubba Rao, J. — The first question is, can the suits be consolidated? That depends upon the meaning of the expression "the same judgment" in O. 45, R. 4, Civil P. C. That order deals with appeals to the King in Council. The judgment referred to in that order must therefore be the judgment of the High Court, that being the one appealed against. In this case, the High Court disposed of the suits by a single judgment. The provision therefore applies.

Next, once an order is made under that section, it relates back to the suits from their very start. What it contemplates is the consolidating of the suits and not of the appeals. The test is, after such consolidation, is the subject-matter of the suits and similarly the subject-matter in dispute on appeal, of the requisite value under S. 110, Civil P. C? The contention that O. 45, R. 4, does not apply therefore fails.

Now that we hold that the provision applies, is there any ground for our refusing to make the order? The intention of the rule is to save time and expense. Unless sufficient grounds are shown, the Court would exercise its discretion in favour of the applicant.

The second question that is raised is one of valuation. According to the report of the lower Court, the value of the subject-matter of the suits is less than Rs. 10,000. But it is argued that the defendant having adopted the valuation given in the plaint, he cannot now be permitted to show that it is wrong. For this position, the applicant relies upon *Kristo Indro Saha v. Huromonee Dassee* (3)

(9) A.I.R. 1929 Mad. 780=122 I.C. 648.

That case applies the doctrine of approbate and reprobate. But what is it then that the defendant cannot be allowed to show that the plaint valuation is wrong; for, that alone he can be deemed to have adopted by his conduct. But the value fixed in the plaint is not synonymous with the market value. Under S. 110, what we are concerned with is the market or real, as distinguished from the court-fee value: see *Bhoo Lakraj Roy v. Kanhya Singh* (7) and *Mohan Lal Sookul v. Debee Doss* (10). In *Krishto Indro Saha v. Huromonee Dassee* (3), the case above quoted, it was assumed, the point not having been taken, that the two values were identical. In my opinion, that case therefore is not an authority for the position, that the defendant is precluded, as a matter of law, from showing that the real value is different from the court-fee value.

But I agree with my learned brother, that the court-fee value is hardly, if ever, more than the real value. In that sense, the previous conduct of the defendant becomes relevant. In this case, the court-fee value (i. e., the value fixed in the plaint) is upwards of Rs. 10,000. I am therefore prepared to assume that the subject-matter of the suits is of the appealable market value. This and nothing more is, in my opinion, the effect of *Krishto Indro Saha v. Huromone Dassee* (3). The conduct of the defendant thus becomes a strong piece of evidence to which the Court attaches the utmost weight. The first part of S. 110 accordingly applies.

As regards the second part of that section, I have nothing to add to what my learned brother has stated.

In the result, I agree in the order proposed by him.

P.R.S./B.V.

Order accordingly.

(10) [1857-59] 7 M.I.A. 428=1 Suth. 458=1 Sar. 739 (P.C.).

* A. I. R. 1932 Madras 129

JACKSON, J.

Sengoda Goundan and another — Petitioners.

v.

Vayapuri Goundan—Respondent.

Civil Revn. Petn. No. 1 of 1931, Decided on 12th May 1931, against order of Dist. Judge, Salem, D/- 21st November 1930, in O. P. No. 28 of 1930.

1932 M/17 & 18

* Criminal P. C. (1898), Ss. 195 and 476—Court cannot sanction prosecution for offences mentioned in S. 195 (1) (c), of person not party to proceeding before it—Anybody (e. g. Court) can complain against abettor of offences mentioned in S. 195 (1) (c).

Section 476 is confined to the exact offences referred to in S. 195, so that the offences in S. 195 (1) (c) must be offences "alleged to have been committed by a party." The Court therefore has no jurisdiction to sanction prosecution for offences referred to in S. 195 (1) (c) of a person who is not a party to any suit or proceeding before it: 42 *Mad.* 540, *Foll.*; 18 *Bom.* 581 and *A. I. R.* 1931 *Bom.* 305, *not Foll.*

Anybody however can complain against an abettor of the offences mentioned in S. 195 (1) (c) and there is no question of the Court itself complaining *qua* Court under S. 476 but then S. 200 (a) will not apply; *A. I. R.* 1928 *Lah.* 510, *Ref.* [P 129 C 2]

T. Rangachariar, V. Ganapati and *R. Ramachandra*—for Petitioners.

V. Sankaran—for Respondent.

Judgment.—The petitioners seek to revise the order of the District Judge, Salem, under S. 476, Civil P. C., complaining against them for abetting a forgery. The learned Judge has overlooked *Govinda Iyer v. Rex* (1), which confines S. 476 to the exact offences referred to in S. 195 so that offences in S. 195 (1) (c) must be offences "alleged to have been committed by a party." The amendment of these sections in 1923 has not affected the reasoning adopted by the Full Bench and so far as this province is concerned that ruling constitutes the binding law. Anybody can complain against an abettor of the offences in S. 195 (1) (c) and there is no question of the Court itself complaining *qua* Court under S. 476. Of course there is nothing to prevent the presiding officer himself complaining if he likes, as pointed out in *A. I. R.* 1928 *Lah.* 510, only then S. 200 (aa) will not apply. In Bombay it has always been held that S. 476 in reference to S. 195 (1) (c) is not confined to parties. In *re Devji Valad Bhavani* (2), from which *Govinda Iyer v. Rex* (1) dissents and which *Balgunda Ramgunda v. Emperor* (3) affirms. It is a pity that the legislature, knowing of this disagreement did not put the matter beyond question in 1923 but since it did not do so nothing is likely to be gained by referring the matter to another Full Bench to see if Madras can be brought into line with

(1) [1919] 42 *Mad.* 540=20 *Cr. L. J.* 344=50 *I. C.* 824 (F. B.).

(2) [1894] 18 *Bom.* 581.

(3) *A. I. R.* 1931 *Bom.* 305=1931 *Cr. C.* 561=32 *Cr. L. J.* 1017=55 *Bom.* 461.

Bombay. The wording of the sections admits either view, and the provinces must agree to differ over what, after all is a mere matter of procedure.

Following *Govinda Iyer v. Rex* (1), as regards the abettors of the alleged forgery I cancel the lower Court's complaint. The petition is allowed.

P.R.S./R.M.

Petition allowed.

A. I. R. 1932 Madras 130

JACKSON, J.

Kalastri Mudali and another—Petitioners.

v.

Emperor—Opposite Party.

Civil Revn. Petn. No. 2 of 1931, Decided on 12th May 1931, against order of District Judge, Salem, D/. 21st November 1930, in O. P. No. 28 of 1930.

Criminal P. C. (1898), S. 476—Application under S. 476 can be reheard in spite of previous dismissal.

Dismissal of an application by a private party to lodge a complaint under S. 476 does not debar the Court from rehearing a second application to the same effect: *A.I.R. 1929 Pat. 242, Foll.*; 29 *Mad. 126* and 31 *Mad. 543, Ref.* [P 130 C 2]

K. S. Jayarama Ayyar and R. Sundaralingam—for Petitioners.

Public Prosecutor—for the Crown.

Judgment.—The petitioner seeks to revise the order of the District Judge, Salem, complaining against him under S. 476, Criminal P. C., for offences under Ss. 467 and 471, I. P. C.

On 15th November 1929 a private party applied to the District Munsif, Salem, praying that he would lodge a complaint under S. 476. This was dismissed on 27th February 1930 and there has been no appeal.

Then on the same day 27th February 1930 another petition was put in, and ultimately dismissed. On appeal from that dismissal the District Judge, Salem, has complained under S. 476.

The question is whether the petition of 27th February and the consequent appeal were competent after the petition of November was dismissed.

This opens up a field which is occupied by two schools of thought. There are those who hold that apart from his statutory powers and limitations a Magistrate is circumscribed by the maxim '*nemo debet bis vexari*' and he cannot expose an accused person to jeopardy

twice; and those who hold that if not expressly forbidden a Magistrate can act within the powers given him by statute, as often as he likes irrespective of his previous action. The two views are fully expressed in *Emperor v. Chinna Kaliappa Goundan* (1), where the latter view prevailed by a bare majority of 3 to 2. Since then it has always been the law in this Presidency at least that a Magistrate can dismiss a complaint under S. 203, and rehear it on the following day. It would seem to follow that he is equally competent to dismiss an application to complain and to re-entertain it.

As the Chief Justice points out on p. 133 of *Emperor v. Chinna Kaliappa Goundan* (1) if a discharge does not operate so as to prevent a revival a fortiori, the dismissal of a complaint will not. Subramania Ayyar, J., argues that it is unjust that a discharged man should be again put upon his trial, which may be unexceptionable as an abstract principle of law (p. 137) but the Code allows it, and a Bench of this Court, in *Emperor v. Maheswara Kondaya* (2), clearly lays down that a Magistrate may himself reopen a prosecution although he has discharged the accused. It is argued that when the Code expressly provides an appeal it cannot be assumed that the Magistrate can proceed in contravention of his previous order. The same argument is not inapplicable to discharges on complaints. Why should S. 436 provide special machinery by way of revision, if the Magistrate can himself override his order? The answer would seem to be that the Magistrate is left free to change his mind, and at the same time the party, if the Magistrate will not change his mind, may have recourse to superior authority.

Limitation will run from the order on the second application; and it cannot be said that the appeal to the District Judge was time barred. There is no need therefore to discuss the applicability of S. 5, Lim. Act, as though the appeal were against the first order of dismissal. That applications under S. 476 can be re-heard in spite of a previous dismissal has been held in *A.I.R. 1929 Pat. 242*.

The petition is accordingly dismissed as regards petitioner 1. As regards the

(1) [1906] 29 *Mad. 126*=16 *M. L. J. 79*=3 *Cr. L. J. 274* (F. B.).

(2) [1908] 31 *Mad. 543*=9 *Cr. L. J. 80*.

abettor, petitioner 2, the petition is allowed: vide judgment in *Sengoda Goundan v. Vayapuri Goundan* (3).

P.R.S./R.M.

Petition dismissed.

(3) A. I. R. 1932 Mad. 129=1932 Cr. C. 109 (1).

**** A. I. R. 1932 Madras 131**

Full Bench

WALLER, REILLY AND ANANTAKRISHNA
AYYAR, JJ.

In the matter of *S. Venkatachari, an Advocate of the High Court.*

Civil Reference, Decided on 10th March 1931, referred to High Court by Bar Council under S. 12 (3), Bar Councils Act.

* (a) Bar Councils Act (1926), S. 12 — Charge against advocate involving criminal offence—No private complaint necessary—Inquiry for misconduct before prosecution is improper and may have serious consequences.

Per *Reilly, J.*—When an advocate is accused of a grave criminal offence, for which no private complaint is required, to deal with him under the Bar Councils Act, for the misconduct involved in the commission of that offence (though committed in connexion with professional work) before he has been tried for the offence is improper. If he is guilty of the criminal offence, he should be punished for it as if he was an ordinary member of the public. If he is tried and convicted of it, then on the basis of that conviction he can be dealt with appropriately under the Bar Councils Act. But, if before he is subjected to any criminal prosecution, the offence alleged against him is made the subject of proceedings for misconduct under the Bar Councils Act, that may have very serious consequences. These consequences considered : 47 *Cal.* 1115; *A.I.R.* 1926 *Cal.* 502 and *A.I.R.* 1927 *Cal.* 536, *Rel. on.* (*English case law discussed*).

[P 133 C 1, 2]

** (b) Bar Councils Act (1926), S. 12 — Minutes of tribunal not unanimous — High Court can consider even opinion of minority.

When a statutory tribunal is invested with jurisdiction over a particular matter, the general rule is that the opinion of the majority should be taken to be the opinion of the body with reference to matters properly within its jurisdiction. It need not be accompanied with the dissenting opinion, if any, of the minority. When however the report or findings have to be submitted by the judicial tribunal to another judicial tribunal, which latter has got jurisdiction and the duty to examine the correctness or otherwise of the report or findings submitted by the former, it is advisable to have the opinions of all the members of the tribunal which inquired into the matter in the first instance; so that the later judicial authority may have the benefit of the opinions, reasonings and findings of all the members of the tribunal on the relevant questions when the decision of the case in the last resort rests with the higher judicial tribunal. Where therefore the members of a tribunal under the Act inquiring into the alleged misconduct of an advocate are not unanimous, the High Court is entitled to take into

consideration even the findings submitted by the minority. [P 136 C 2, P 137 C 1, 2]

* (c) Letters Patent (Madras) Cl. 10 — Three Judges can inquire into misconduct of advocate—Madras High Court Rules (Appellate Side), R. 8.

Under Cl. 10, it is not necessary that the full Court of all Judges should deal with the inquiry into alleged misconduct of an advocate and a Bench of three Judges has jurisdiction to hear the case. [P 137 C 2]

* (d) Bar Councils Act (1926), S. 12—Witnesses examined by tribunal — Question of appreciation of evidence—High Court would attach great weight to opinion of tribunal.

The High Court would naturally be inclined to attach great weight to the opinion of the tribunal of the Bar Council in cases inquired into by that tribunal, more especially when questions of appreciation of oral evidence of witnesses who were examined by the tribunal arise. [P 139 C 1]

* (e) Bar Councils Act (1926), S. 12 (5)—Proceedings after Act relating to misconduct prior to Act—Costs can be ordered against advocate.

Where an inquiry into alleged misconduct of an advocate should have been disposed of before the Bar Councils Act came into force, but as a matter of fact the inquiry takes place under the Act, the High Court has jurisdiction to direct the payment of costs of proceedings before the Bar Council and before the High Court.

[P 139 C 1]

T. V. Muthukrishna Ayyar—for Advocate-General.

K. S. Krishnaswamy Aiyangar — for Bar Council.

Waller, J.—The facts have been set out at length in the finding of the tribunal and it is not necessary for me to recapitulate them. Briefly, the questions for decision are whether:

(1) The two payments relied on by the respondent were made on the dates alleged; (2) the receipts produced by him in support of them were given to him by the complainant on those dates, and (3) his letters of June and November 1924, and the connected certificates of posting are genuine.

That the burden of proof is on the complainant is clear. That he is a witness, whose evidence needs corroboration, is equally clear. Parts of his story, so far as it relates to the last promissory note (Ex. 22) are not credible and have been rightly rejected by the tribunal. It is impossible to believe that this note represented an advance for the proposed purchase by him of some ground from the Wesleyan Mission or that he lent the respondent money to buy stamps for that purpose. In these respects he has shown himself to have little regard for truth. That however is not by itself enough to conclude the controversy against him. The respon-

dent seems to think that it is, and devoted the greater part of an argument extending over nearly five days to a series of attacks on his character and credibility in this connexion. It was pointed out to him repeatedly, but largely in vain, that he was attacking a position, which Mr. Muthukrishna Aiyar, to whose assistance I must acknowledge our great indebtedness, had not attempted to defend and that he would be better advised to turn his attention to the circumstances that seemed to tell heavily against himself. This advice he would follow for a short time, but he always returned in the end to the same argument: that the burden of proof was on the complainant who should not be believed. It being conceded that the complainant's evidence must be corroborated, the question is whether sufficient corroboration of it is forthcoming. He has to prove a series of negatives and the only corroboration of his denials that can be expected is to be looked for in the circumstances, the probabilities and the conduct of himself and the respondent at the relevant stages of their dealings with each other. Judged by this test, I think that ample corroboration is forthcoming. At every turn the respondent's story is beset with doubts and difficulties, which have not been satisfactorily solved. The majority of the tribunal do not deny their existence, but have found in his favour in spite of them. Their finding is based largely on their acceptance of the evidence of one Srinivasa Aiyangar and on Exs. R. and U. I may say at once that, in my opinion, the evidence of Srinivasa Aiyangar should have been rejected and that Exs. R and U do not justify the construction placed on them. They do not necessarily give rise to an inference that, at the time at which they were written, little or nothing was due on Exs. A and B. (With these observations, his Lordship proceeded to consider evidence relating to the period at which the controversy began and concluding that the payments were not made, that the receipts were forgeries and that Exs. L and L-1 and the letters entered on them were forgeries, proceeded.) For misconduct of such gravity there can be only one penalty and that penalty must be inflicted. Respondent is removed from practice and his name is struck off the roll of

advocates. It is true, as he has pointed out, that there has been very great delay in dealing with his case, but I see no reason to suppose that it has resulted in any evidence in his favour having disappeared. He will pay the costs of the proceedings before the tribunal and before this Court.

On the other points taken by the respondent, I concur in the opinion expressed by my brother Anantakrishna Ayyar. On the question raised by my brother Reilly, as to the inadvisability of substituting a disciplinary inquiry for a prosecution in a case of grave criminal misconduct, I see no necessity to express any opinion.

In the case before us, the only person who could order a criminal prosecution was Beasley, J., As he declined to do so, *cadit quaestio*.

Reilly, J.—(After stating the facts of the case his Lordship proceeded): At the beginning of our hearing the respondent contended that the tribunal had no power under the Act or the rules made under it to submit more than one report and that the report and finding of the majority of the tribunal alone had any validity and alone could be considered by us. Although we did not at the time come to any finding in regard to that contention, it was intimated to the respondent that on this occasion we should not consider the report of the third member of the tribunal against him. We now agree that, as stated in the judgment of my brother Anantakrishna Ayyar, we are entitled to consider the reports and findings both of the majority and the minority of the tribunal; but in this case we have not considered the minority report. I may add that I agree also with the opinion of my brother Anantakrishna Ayyar in the judgment to be delivered by him on the objections raised by the respondent to the validity of the present proceedings against him.

It will be observed that the charges against the respondent are in effect charges of very serious criminal offences. They amount at least to charges that he has abetted the forgery of two receipts acknowledging the payment of money and has abetted forgery in respect of the two certificates of posting and in respect of all those documents that he has dis-

honestly used them as genuine knowing them to have been forged. If he is guilty of abetting the forgery of the two receipts Exs. K and K-1 or of using them with knowledge that they had been forged for either of those groups of offences alone he is liable under the Penal Code to transportation for life or to imprisonment for 20 years. And for those offences, which were not connected with any professional work nor committed when he was acting in any professional capacity, we are in effect trying him in these proceedings. With great respect I do not think it would be right for me to refrain from making it clear that this procedure appears to me to be both incorrect and objectionable. Misconduct which is the subject of inquiry under the Bar Councils Act may often involve the commission of criminal offences. The criminal offence involved may sometimes be of a petty nature, such as trespass or assault, or may be only incidental to the misconduct which is the serious matter alleged against the advocate concerned. In such cases it may often be quite unnecessary to insist that the criminal charges should be disposed of before the advocate's conduct is investigated under the Bar Councils Act. Again the criminal offence alleged against the advocate may be such that he can be prosecuted for it only on the complaint of a private person, which has not been made, or may be one in respect of which it is obviously appropriate that the complaint should be made by a private person and no such complaint has been made. In either of those cases there may be nothing improper or inappropriate in launching an inquiry into misconduct under the Bar Councils Act, although the criminal charge involved has not been disposed of.

But when, as in the present case, the advocate is accused of a grave criminal offence, for which no private complaint is required, to deal with him under the Bar Councils Act for the misconduct involved in the commission of that offence, before he has been tried for the offence, appears to me altogether improper. If he is guilty of the criminal offence, he should be punished for it as if he was an ordinary member of the public. If he is tried and convicted of it, then on the basis of that conviction he can be dealt with appropriately under

the Bar Councils Act. But, if before he is subjected to any criminal prosecution the offence alleged against him is made the subject of proceedings for misconduct under the Bar Councils Act, that may have very serious consequences. To begin with, the advocate will be tried in effect for the criminal offence by a procedure unknown to the criminal law on the evidence of witnesses who have never appeared before the Judges who have to decide the case. It appears to me clearly improper that, unless we are compelled to do so, we should make such a grave departure from the ordinary criminal procedure prescribed by law. In many cases such a course might be gravely prejudicial to the advocate concerned.

It is true that the Judges, though they can blast an advocate's character by finding him guilty of the criminal offence in such a case, can impose no penalty such as is provided by the Penal Code; but that is not a sufficient reason for depriving him of the protection which the criminal law gives to an ordinary accused person. And on the contrary the finding and procedure in such an inquiry as this may well obstruct the course of justice and shield the advocate from the penalty to which he is liable under the ordinary law of the land. It may well happen that an inquiry under the Bar Councils Act may result in an acquittal in a case where the ordinary course of investigation and prosecution would have ended in a conviction; and that acquittal would almost certainly save the advocate from further prosecution on the same charge. But a much more serious aspect of the matter is that, if a Bench of this Court, as the result of an inquiry under the Bar Councils Act, found an advocate guilty of the criminal offence alleged against him, it is extremely likely that he would escape the due punishment provided for his offence by the Penal Code. If he had been found guilty by a Bench of this Court, he could urge with great effect that by that he would be so seriously handicapped in any trial for the same offence before an ordinary criminal Court that it would be unjust to subject him to it. And, if he had elected to give evidence in the inquiry under the Bar Councils Act and to subject himself to cross-examination he could, and no doubt would, claim additional shelter from any subsequent criminal prosecution

on the same charge. In this country no accused person can be subjected to cross-examination, and the fact that he had been so subjected and material had been so elicited for use against him would enable him to represent himself as a most gravely aggrieved person in any subsequent prosecution, even if there were no great substance in the grievance. In the present case Beasley, J., was induced to choose this inquiry into the respondent's conduct instead of a criminal prosecution in order that the respondent should have a chance of giving evidence and offering himself for cross-examination. It does not appear to me at all improbable that under the guise of anxiety to offer himself as a witness the respondent was manoeuvring to shelter himself from subsequent prosecution.

But, whether that was his intention when he made his representation to Beasley, J., or not, I have no doubt that that objection would be taken to any subsequent prosecution. Beasley, J., has stated that he was influenced in the course he took by his opinion that it is desirable that accused persons should have an opportunity of giving evidence in their own behalf. For myself I may say that a long experience of criminal trials in Courts of every grade in this Presidency leaves me in doubt whether it would be advantageous in this country to allow accused persons the right to give evidence in their own behalf. But without discussing that question I may perhaps point out with the greatest respect that the law of this land neither gives an accused person that privilege nor subjects him to the danger of cross-examination, which must go with it. That being so, with the greatest respect, it does not appear to me proper to deflect the ordinary procedure on account of any such consideration. In my opinion, if an advocate is accused of criminal offences such as those alleged against the respondent, and the Judge to whose notice they come regards it as expedient in the interests of justice that an inquiry should be made into them as I understand Beasley, J., regarded it, the ordinary criminal procedure which would apply to any other man, should be followed; so far as the criminal offences are concerned the advocate should be allowed to gain no advantage nor be subjected to any disadvantage from pro-

ceedings to which a private person against whom such offences were alleged would not be liable; least of all should he be shielded from the ordinary penal consequences of what he may have done; he should be tried like any other person according to the ordinary law of the land; when that has been done, it will be time enough to deal with his professional position if necessary. I feel so strongly that we ought not to be trying the respondent for these criminal offences alleged against him, that even after all the delay there had been in this case I should not have consented to take part in these proceedings at this stage but should have proposed that they be adjourned until the respondent had been tried by a criminal Court, if that had still been possible. But as it is alleged that the criminal offences with which he is accused were committed in respect of documents produced in Court in proceedings to which he was a party, S. 195, Criminal P. C., precludes any criminal Court from taking cognizance of those offences except on a complaint from the Court of Small Causes or from this Court, and Beasley, J., decided that no such complaint should be made. It happens therefore that the respondent is protected from any criminal prosecution in the matter. In the peculiar circumstances of this case he can be dealt with only in proceedings under the Bar Councils Act, and for that reason I join in these proceedings, though with great reluctance.

I may mention that in England it has long been the established rule that disciplinary action may be taken against attorneys and solicitors for conduct of a criminal character which shows them unfit to exercise their professional functions, even if they have not been tried on the criminal charge involved. In *Stephens v. Hill* (1) that rule was applied to an indictable offence. But in that case, where the charge against the attorney was of misconduct in a cause in which he was professionally engaged, Lord Abinger said that

"if the attorney has been guilty of something indictable in itself, but not arising out of the cause (in which he is engaged professionally) the Court would not inquire into that with a view to striking him off the roll, but would leave the party aggrieved to his remedy by a criminal prosecution. . . . Where indeed the attorney

(1) [1842] 10 M. & W. 28=1 D. (N. S.) 669=11 L. J. Ex. 329=6 Jur. 585.

is indicted for some matter not connected with his profession of an attorney, that also is a ground for striking him off the roll, although in that case it cannot be done until after conviction by a jury."

In *In re Hill* (2) where an attorney admitted an act of misappropriation committed, not when he was acting as attorney, but as clerk to other attorneys, Cockburn, C. J., said that

"if there had been a conflict of evidence upon the affidavits, that might be a very sufficient reason why the Court should not interfere until the conviction had taken place."

In *In re Chandi Charan Mitter* (3) the rule in England is I think correctly indicated, namely that, if an attorney is charged with a criminal offence not done in connexion with his professional work, then, if the act is indictable and is fairly denied, the Court will not proceed against him for misconduct until he has been convicted by a jury. That rule, if we followed it—and I can see no reason why we should not do so—would be sufficient to prevent disciplinary action being taken in a case such as this until the advocate had been convicted by a criminal Court. But in this country I think we should go further; and when the charge against an advocate is of a grave criminal offence, for the prosecution for which no private complaint is necessary nor essentially appropriate, the charge should first be tried by a criminal Court, even if the offence is alleged to have been committed in connexion with the advocate's professional work. The reason given by Lord Abinger in *Stephens v. Hill* (1) for not waiting for the criminal conviction before taking disciplinary action is that the party aggrieved might delay or fail to undertake prosecution. That reason does not apply in this country in a case where the Court can make a complaint under S. 476, Criminal P. C., nor in a cognizable case in which information is given to the police nor in any other serious case in which a Magistrate authorizes investigation by the police. In all those cases if a complaint is made by the Court or the police are set in motion, a criminal prosecution is likely to come to an end not less speedily, and in general more speedily, than an inquiry by a tribunal of the Bar Council followed by proceedings before a Bench of this Court. Apart therefore from the special reasons which I have

mentioned, which may lead in this country to proceedings under the Bar Councils Act seriously handicapping an advocate in subsequent criminal prosecution on the same charge and so in effect precluding him from being subjected to prosecution, the reason of delay in prosecution or failure to prosecute, which may have justified disciplinary action in England on a criminal charge, on which the practitioner had not yet been tried by a criminal Court, is of practically no force in this country even when the criminal offence is alleged to have been committed in connexion with the practitioner's professional work.

In my opinion, when the essential charge against the advocate or legal practitioner concerned is that he has committed a grave criminal offence either in connexion with his professional work or entirely outside it, the only course just alike to him and to the public is that he should first be tried by a criminal Court like any other man, gaining no advantage and suffering no disadvantage from his professional position. That we should weigh the scales for him or against him in that matter would be worse than deplorable, and I see no adequate reason why we should adopt any course likely to have that effect. If the criminal trial ends in a conviction, then it will be for this Court to consider under the procedure prescribed by the appropriate Act what disciplinary action should be taken. Even if the practitioner is acquitted in the criminal Court it may be necessary in some cases to take disciplinary action against him either because he has been acquitted on a technical point or because the conduct proved against him, though not criminally punishable, merits such action. But the question of criminal guilt will be tried where it should be in a criminal Court. When the criminal offence alleged is trivial or only incidental to serious misconduct of another nature or it is possible or appropriate that the practitioner should be tried for the criminal offence only on the complaint of a private person, then the disciplinary proceedings need not be delayed because no criminal prosecution has been undertaken, though if a criminal prosecution is in progress or imminent, it may often be desirable even in such cases that the disciplinary proceedings should be post-

(2) [1868] 3 Q. B. 543=9 B. & S. 481=37 L. J. Q. B. 295=18 L. T. 564=16 W. R. 1061.

(3) [1920] 47 Cal. 1115=57 I. C. 931.

poned until the prosecution has come to an end.

I am glad to find that my view that, when the essence of the charge against the practitioner is that he has committed a grave criminal offence, even though its commission was in connexion with his professional work, he should be tried by a criminal Court before disciplinary action is taken against him has been adopted by three Benches of the Calcutta High Court, namely, in *In re Chandi Charan Mitter* (3), *In the matter of Rajendra Kumar Dutta* (4) and *In the matter of Satis Chandra Singha* (5), though, if I may say so with respect, the reason given in the first of those cases for requiring a criminal prosecution to be undertaken does not appear to me to be the only one. In the present case, as I have mentioned, it is not alleged that the criminal offences with which the respondent is charged were committed in any connection with his professional work.

On the facts of this case I agree with the finding of my brother, Waller, J. (His Lordship considered the evidence in detail and proceeded) I regret that I have found it necessary to criticize the report of the majority of the tribunal at such length. It is our duty to take that report into careful consideration and if we differ from it, to state our reasons. The hearing before the tribunal was spread over 7½ months; the evidence was recorded at intervals of 17 occasions and the arguments were heard on six occasions spread over 5 1/2 weeks. No doubt the members of the tribunal find it difficult to hear such a case continuously. But it appears to me probable that many of the defects to be found in the report of the majority are due to this method of hearing. In my opinion however they were engaged on a task which was not properly theirs. The Bar Council has no machinery to investigate nor have its members the time to hear a long criminal case. If this case had been investigated and prosecuted in the ordinary course, it would have been over years ago, its hearing would have occupied far less time, and the facts would have been more completely presented. Both the members of

the tribunal and Mr. Muthukrishna Ayyar, whom they appointed to conduct the case were at serious disadvantage in handling it.

I agree that the respondent must be found guilty on all parts of the charge framed against him and that he must be removed from practice and ordered to pay the costs of these proceedings and of the proceedings before the tribunal.

Anantakrishna Ayyar, J.— In this case the tribunal of the Bar Council appointed by the Chief Justice consisted of three members; and after hearing the allegations against the advocate and considering the evidence, two members of the tribunal were of one opinion and the third of a different opinion. The question was raised before us whether the High Court is entitled to consider the findings recorded by the dissentient member, or whether the High Court's consideration should be confined to examining the correctness or otherwise of the findings arrived at by the majority. Our attention was drawn to Rr. 3, 4 and 9 of the rules framed, by the High Court and to the relevant sections of the Bar Councils Act. When a statutory tribunal is invested with jurisdiction over a particular matter, the general rule is that the opinion of the majority should be taken to be the opinion of the body with reference to matters properly within its jurisdiction. It was argued that the High Court should consider only the opinion of the majority of the Bar Council tribunal, and should ignore the findings and reasonings of the minority.

In cases where a statutory body is charged with the duty of giving advice to a final executive authority, the policy would seem to be to require the advice to be put in a definite form, and not to be accompanied with the dissenting opinion if any, of the minority. For example, R. 45 (3) of the Madras Legislative Council Electoral Rules provides that

"the report shall be in writing and shall be signed by all the commissioners. The commissioners are forthwith to forward their report to the Governor, who on receipt thereof, shall issue orders in accordance with the report and the orders of the Governor shall be final."

Under R. 46:

"If either in their report or upon any other matter there is a difference of opinion among the Commissioners the opinion of the majority shall prevail, and their report shall be expressed in the terms of the views of the majority."

(4) A. I. R. 1926 Cal. 502=94 I. C. 893=27 Cr. L. J. 701.

(5) A. I. R. 1927 Cal. 536=110 I. C. 217=54 Cal. 721.

When however the report or findings have to be submitted by one judicial tribunal to another judicial tribunal, which latter has got jurisdiction and the duty to examine the correctness or otherwise of the report or findings submitted by the former, it would be advisable to have the opinions of all the members of the tribunal which inquired into the matter in the first instance, so that the final judicial authority may have the benefit of the opinions, reasonings and findings of all the members of the tribunal on the relevant questions when the decision of the case in the last resort rests with the higher judicial tribunal. In pursuance of such policy and to make matters clear, similar provisions have been made by the legislature, for example, in S. 265, Criminal P. C.:

"when a criminal case is tried by a Bench of Magistrates, if the Bench differ in opinion any dissentient member may write a separate judgment."

We find that some of the High Courts have framed rules under the Bar Councils Act on this point. For example, Rr. 13 and 14 framed by the High Court of Calcutta are as follows:

"Rule 13. The finding of the majority of the tribunal shall be the finding of the tribunal in case of difference of opinion, provided that a dissentient member of the tribunal may record his dissent by a note in writing.

Rule 14. The finding of the tribunal shall be in writing and the same shall be forwarded with such a note of dissent, if any, to the High Court in the manner provided by S. 12 (2)."

Referring to the rules framed by the Rangoon High Court, R. 10 runs as follows:

"In the case of an inquiry by the tribunal the finding shall be signed by each member thereof, and the members may if not unanimous in opinion, record separate findings."

Rule 7 framed by the Allahabad High Court states that:

"the tribunal shall then proceed to consider and record its findings, provided that each member of the tribunal shall if he so desires, be entitled to record a separate finding."

As far as we have been able to ascertain, the Bombay High Court has not framed any specific rule on the point now before us. R. 2 provides:

"The tribunal shall then consider its findings and remit it with a copy of its reasons through the Bar Council to the High Court."

Rule 6 is to the following effect:

"In all matters not provided for by these rules, the tribunal will follow the principles of natural justice."

It may be that as a matter of practice members of the tribunals of the Bar

Council may or may not think it advisable to record dissentient findings, but that is a matter entirely for the tribunal of the Bar Council. So far as the High Court is concerned, with which alone rests the final decision on the merits of the case *prima facie* the reasoning and the opinion judicially formed by the minority of the Bar Council tribunal would also be useful in arriving at the final result.

Under S. 11 of the Act, the tribunal may consist of an even number of members (four); and if in such cases the members are equally divided in opinion there would be difficulty in saying which of the findings should be taken to be the findings of the Bar Council Tribunal for the purpose of the Act.

To make matters clear, it seems to us desirable that specific rules should be framed on the point.

Pending further consideration of the point, it was intimated to counsel on the first day of hearing that the findings submitted by the minority (which happens in this particular case to be against the advocate) would not be taken into consideration. After considering the point, we are of opinion that the High Court is also entitled to take into consideration the findings submitted by the minority, though we may state that in the present case we have come to the conclusion on the merits of the case ourselves independently of the opinion of the minority of the Bar Council Tribunal.

Again, it was argued that under S. 10, Letters Patent, the full Court of 14 Judges should deal with this matter, and that a Bench of three Judges has no jurisdiction to hear this case. We are unable to agree with this contention. S. 10, Letters Patent, empowers the High Court to remove or suspend from practice, on reasonable cause, any advocate of the High Court. A rule has been framed that;

"Every inquiry under Cl. (10), Letters Patent shall ordinarily be heard and determined by a Bench of three Judges; See R. 8, p. 7, Appellate Side Rules."

On Beasley, J.'s report to the then Chief Justice, the Chief Justice referred the matter to three Judges to whom was assigned the duty of dealing with such cases, and in accordance with their opinion the late Chief Justice directed the matter to be referred to the Bar Council

for inquiry, and appointed three members of the Bar Council to form the tribunal for inquiring into the matter. After the findings of the Bar Council were received, the present Chief Justice appointed the present Bench of three Judges for hearing this case. It seems to us that in the circumstances this Bench is entitled to hear this matter. We may also state that when a similar objection was raised before the High Court in *Anandalwan v. The Judges of the High Court of Judicature at Madras* (6) the Bench of three learned Judges, disposed of the objection as follows:

"Objection was taken to the competency of this inquiry: the first objection being that this Bench of three Judges is inadequate, and that the matter should be dealt with by the Full High Court under S. 10, Letters Patent. This entirely ignores the rules framed under that clause which delegate the duty to a Bench of three Judges, and this has been the invariable practice in this Court."

In the appeal to the Privy Council, R. 8, under which

"every inquiry under S. 10, Letters Patent, shall ordinarily be heard and determined by a Bench of three Judges"

was referred to by the Privy Council, and the Privy Council observed that

"several objections to the procedure were taken by the appellant in the Courts below, these were not maintained before their Lordships"; See *Anandalwan v. The Judges of the High Court of Judicature at Madras* (6)."

We accordingly overruled the objection.

It was also argued that though Beasley, J., (as he then was) in his order, dated 7th May 1926, resolved

"to make a report to the High Court in its disciplinary jurisdiction, and asked that an inquiry may be made to be directed after an explanation has been sought for from the advocate in question into the truth of these allegations because I think that such a charge as this cannot be left where it is,"

yet no explanation was called for from the advocate, and that consequently the whole proceedings should be declared illegal. In this connexion the following passage from the report of the Bar Council Tribunal may be quoted:

"This reference arises out of O. S. Nos. 8, 9 and 10 of 1926 disposed of by the Honourable Beasley, J., as he then was, on 7th May 1926. The papers, after some delay, with the judgment in the case, were forwarded by his Lordship Beasley, J., to the Honourable the Chief Justice for such action as he might think proper to take on 15th March 1927. The delay in taking such action by his Lordship was due to the fact that he at first took the view that the conduct of the

advocate complained of was not in the capacity of an advocate but as a litigant; and his Lordship decided that it was a matter to be dealt with purely criminally. Later on, however, his Lordship changed his mind on a representation made on behalf of the advocate that it could be dealt with by the High Court on its disciplinary side also."

The advocate and his legal advisers had plenty of opportunity all along in this matter to put in any explanation if thought fit and it was at the special request of the advocate that the matter was dealt with by the High Court on its disciplinary jurisdiction instead of the matter being dealt with by the criminal Court. The advocate appeared before the tribunal of the Bar Council and filed a written statement on 1st November 1929. The allegations contained in that written statement were duly inquired into by the tribunal. In the circumstances we do not think that there is any force in this contention either.

Another interesting question of great importance has been discussed in the judgment of Reilly, J., (the question itself was not fully argued in Court in this case) about the propriety of a criminal prosecution preceding an inquiry under the Bar Councils Act in cases where the facts would suggest the commission of a very serious criminal offence punishable under the Penal Code. I do not propose in the circumstances to discuss that question at present, because Beasley, J., who tried the civil suits, though at first inclined to send the matter to the criminal Court, resolved finally not to do so in the present case, being influenced by the request made on behalf of the advocate that the inquiry should be under the Bar Councils Act. Having regard to the provisions of S. 195, Criminal P. C., and having regard to the special circumstances of this case, it seems to me that it is not desirable or proper to drop or adjourn the present proceedings, and that we should in the rather peculiar circumstances dispose of the matter before us on the merits.

On the merits, the question is whether the charges against the respondent have been proved. The majority of the Bar Council Tribunal

"felt the greatest difficulty in coming to a conclusion on the questions involved in this case."

They further observed as follows:

"There is no doubt this initial suspicion attaches to this (respondent's) story This

(6) A. I. R. 1930 P. C. 144=123 I. C. 184=31 Cr. L. J. 489 (P. C.).

suspicion receives further strength from the somewhat doubtful account of Venkatachari's as to how he found the necessary funds for making these payments."

Later on:

"Perhaps it may be difficult to accept Venkatachari's story in its entirety as to the source from which he found the money for making the payments."

As regards the Postal Certificates Exs. L and L-1, the remark

"their genuineness is not free from suspicion. Their appearance is no doubt against them. The alterations are patent on their face."

The majority expressly state that they "felt the greatest difficulty in coming to a conclusion on the questions involved in this case."

The High Court would naturally be inclined to attach great weight to the opinion of the tribunal of the Bar Council in cases inquired into by that tribunal, more especially when questions of appreciation of oral evidence of witnesses who were examined by the tribunal arise. But in the present case, while agreeing with the tribunal that no "credence could be attached to the complainant's oral evidence unless the same be corroborated" (as a mere reading of the complainant's deposition would show) I think that the circumstantial evidence in the case against the respondent is too strong to be got over. (Here his Lordship discussed the evidence and proceeded as follows:) When these serious charges are held to be proved, I think we are bound to remove the respondent from practice and to direct the removal of his name from the list of advocates. I also agree in the order as to costs proposed by my learned brother, Waller, J.

By the Court.—The order of the Court is that the respondent be removed from practice and that his name be struck off the roll of advocates and that he do pay the costs of the proceedings before the tribunal and here. It is contended by him that his case should have been disposed of before the Bar Councils Act came into force and that, as there was no specific provision for the payment of costs before that Act came into force, we should not direct him to pay the costs. We are unable to agree to this proposition. The inquiry did take place under the Act and we are not prepared to concede that there was no jurisdiction to direct the payment of costs before it was passed. We fix a fee of Rs. 750 for

Mr. Muthukrishna Aiyar's appearance before the tribunal and here.

P.R.S./R.K.

Order accordingly.

* A. I. R. 1932 Madras 139

RAMESAM, OFFG. C. J. AND CORNISH, J.
(Mari) Naganna & another—Appellants.

v.

(Peruri) Krishnamurthi—Respondent.

Letters Patent Appeal No. 86 of 1928,
Decided on 17th August 1931.

* Limitation Act (1908), Ss. 4, 6, 8 and 12 to 16—There is nothing in Ss. 6, 8 and 12 to 16 to prevent suitors coming within those sections from having benefit of S. 4.

The phrase "period of limitation prescribed for any suit, etc." is wide enough to include a period of time contained in Sch. 1 but computed with the aid of one or more of Ss. 12 to 16 or starting from the date of attaining majority under S. 6, and consequently a suitor who comes within the above sections can have the benefit of S. 4.

Where the period of limitation was three years from 12th May 1920 when the plaintiff attained majority according to Sch. 1, taken with S. 6, and such period expired on a day when the Court was closed:

Held: that the suit could be filed on the reopening day by virtue of S. 4: 21 I.C. 770; A.I.R. 1930 Mad. 991, *Ref.*; 52 I.C. 725, *Doubted.*; 36 Bom. 268; 10 I.C. 910, *Disc.*; 26 Bom. 782; A.I.R. 1921 Mad. 654, *Dist.*; 1922 Mad. 268, *Expl.* [P 141 C 1]

C. Rama Rao—for Appellant.

A. Somasundaram—for Respondent.

Ramesam, Offg. C. J.—The facts out of which this Letters Patent Appeal arises are as follows:

The suit was filed on an unregistered bond dated 26th February 1915. The bond was taken in favour of a minor by his guardian. The minor attained majority on 12th May 1920 and computing three years provided under S. 6, Limitation Act, the suit ought to have been filed on or within 12th May 1923. But on that date the District Munsif's Court of Peddapur was closed and so the suit was filed on the reopening day, i. e., 4th June 1923. The Subordinate Judge held that the suit was in time and on second appeal our brother Reilly, J., agreed with the Subordinate Judge's view. This Letters Patent Appeal is filed against the judgment of Reilly, J. The question is whether S. 4, Limitation Act, can be utilized after getting an extension by reason of the provisions of S. 6, Lim. Act. I may at once observe that there is no direct decision on the point. The learned advocates have referred us to decisions with reference to S. 4 and other sections which have a possible bearing. First we

have got a decision in *Narasimha Deo Garu v. Krishnachandra Deo Garu* (1). In that case two brothers, members of a joint family, filed a suit to recover their shares of the zamindari. It was found that plaintiff 1 attained majority more than three years and two months prior to suit and that the suit was barred by reason of the two plaintiffs being members of a joint family on the application of S. 7, Limitation Act. But apart from this ground, there was a further ground on which the learned Abdur Rahim and Spencer, JJ. held that plaintiff 2's claim was barred, viz., that the period of two months which is the period of notice of suit given under S. 49, Court of Wards Act, cannot be deducted under S. 15 (2), while the plaintiffs had the benefit of the three years allowed under Ss. 6 and 8. That decision is distinguishable for S. 15 and Ss. 12 to 14 and 16 deal with computing periods of limitation and provide for the exclusion of certain periods in such computation. I also entertain some doubts about the correctness of the second ground of the decision. Nor has S. 4 anything to do with computation of the period of limitation. After making all the necessary computations, if the period expires on a day when the Court is closed S. 4 permits the suit to be filed on the reopening day. The indulgence given by S. 4 does not depend upon any computation. Therefore the decisions under the sections which deal with the computation of the period of limitation ought not to be used in connexion with S. 4.

Another case relied on is a decision in *Shevdas Daulatram v. Narayan* (2). The question there was whether S. 4, Limitation Act, can be utilized in cases where the party gets the benefit of S. 31 and it was held that it could not be so utilized. But this decision has been dissented from in *Murugesu Mudali v. Ramaswami Chettiar* (3) and *Sheshayya Chetty v. Subbadu* (4), where all the decisions are collected; and it appears that other High Courts also have dissented from it. We are inclined to agree with all these decisions in dissenting from the case in *Shevdas Daulatram v. Narayan* (2).

The next case referred to is a decision

in *Subbarayan v. Natarajan* (5). In that case at p. 795 after putting the question "What is meant by a period of limitation?" I observed:

"In the first place it probably does not include mere periods of extension, such as the period of two years under S. 31, Limitation Act, quoting here *Dayaram v. Laxman* (6), and the period of three years referred to in S. 8, Limitation Act, quoting the case in *Narasimha Deo Garu v. Krishna Chandra Deo Garu* (1), as the only authority."

The decision in *Dayaram v. Laxman* (6), was followed in *Shevdas Daulatram v. Narayan* (2) which as I have said has been dissented from repeatedly.

The other decision is the same as that reported in *Narasimha Deo Garu v. Krishnachandra Deo Garu* (1), as to which I have already expressed my doubts.

The observation in *Subbarayan v. Natarajan* (5) at p. 795 (of 45 Mad.) must have been made by me because the decisions were there; and because it is not clear that I should agree with them, I used the word "probably." It seems to me that that judgment would stand better if that sentence is expunged. My final conclusion in that judgment was that a period of limitation need not be necessarily a period of limitation under the Limitation Act, but it may be contained anywhere provided it is a strict period of limitation and I held that the period in S. 48, Civil P. C., was not a period of limitation in the stricter sense. My reasons differed somewhat from those of my learned brother Spencer, J.

It will be convenient now to refer to the other cases which relate to the combined use of S. 4 with the other sections of the Act. One is *Bai Hemkore v. Nasamalli* (7). There it was held that S. 4 of the Act cannot be utilized when its application precedes the benefit to be derived under S. 19, Lim. Act.

In *Ummathu v. Pathumma* (8) a similar question arose whether the benefit of S. 4 can be utilized when it precedes the application of S. 14, Lim. Act, and myself and Spencer, J., held that it could not be so utilized. At p. 823 (of 44 Mad.) I referred to *Bai Hemkore v. Nasamalli* (7) observing that it was held there:

"that S. 4 cannot be tacked on prior to the period of extension given by S. 19."

(6) A. I. R. 1922 Mad. 268=70 I. C. 396=45 Mad. 785.

(6) [1911] 10 I. C. 910.

(7) [1902] 26 Bom. 782=4 Bom. L. R. 608.

(8) A. I. R. 1921 Mad. 654=63 I. C. 924=44 Mad. 817.

(1) [1919] 52 I. C. 725.

(2) [1912] 36 Bom. 268=12 I. C. 811.

(3) A. I. R. 1914 Mad. 663=21 I. C. 770.

(4) A. I. R. 1930 Mad. 991=128 I. C. 867.

These two decisions do not help the appellants in the present case. Here the respondent wants to use S. 4 as the last step for his suit. Having utilized all other exclusions in computation permitted by the Limitation Act, whatever they are, as the period of limitation expired on a day when the Court is closed he wishes to file the suit on the reopening day. S. 4 comes in as the last step to help the plaintiff. This was not the case in the two decisions just mentioned. In my opinion the phrase "the period of limitation prescribed for any suit etc" in S. 4 is wide enough to include a period of time contained in Sch. 1 of the Limitation Act, but computed with the aid of one or more of Ss. 12 to 16, Lim. Act or starting from the date of attaining majority under S. 6 of the Act. In the present case the period of limitation is three years from 12th May 1920 when the plaintiff attained majority according to the first schedule taken with S. 6 of the Act. Such period expired on a day when the Court was closed and the suit could therefore be filed on the reopening day.

In my opinion the decision of Reilly, J., is right and the appeal ought to be dismissed with costs.

Cornish, J.—The short question for decision appears to me to be whether there is anything in Ss. 6 and 8, Lim. Act, to prevent a suitor who comes within those sections from having the benefit of S. 4. In my opinion there is not. S. 4 provides an exception to the general rule laid down in S. 3. S. 6 enables a person who was a minor at the time from which the period of limitation is to be reckoned, to institute a suit within the same period after he attains majority as would otherwise have been allowed from the time prescribed therefor in Col. 3 of Sch. 1. This concession is cut down by S. 8 which says that nothing in S. 6 shall be deemed to extend for more than three years from the cessation of the disability the period within which any suit must be instituted. The illustrations to S. 8 make it quite clear that what is meant is that when time has begun to run against a person during his minority in no case is the period in which he can institute a suit to be extended for more than three years after the cessation of the disability. In other words, by the operation of Ss. 6 and 8

the prescribed period within which an ex-minor can institute a suit is limited to three years from the date when he reached majority. If the three years so prescribed expire on a day when the Court is closed, the position seems to me to be precisely within the terms of S. 4. S. 4 does not extend the period of limitation beyond the prescribed period. But it enables the plaintiff, by excluding the time during which the Court is closed, to institute his suit on the reopening day and so to have the benefit of the three years period which the Act gives him for that purpose.

I agree that the appeal should be dismissed with costs.

P.R.S./V.B.

Appeal dismissed.

A. I. R. 1932 Madras 141

REILLY AND ANANTAKRISHNA
AYYAR, JJ.

Suppan Chetti—Plaintiff—Appellant.
v.

Yegnanarayana Ayyar and others —
Defendants—Respondents.

Letters Patent Appeal No. 375 of 1926, Decided on 23rd September 1931, against judgment of Waller, J., in S. A. No. 605 of 1924 reported in *A. I. R.* 1927 *Mad.* 1111.

(a) **Mortgage—Discharge of mortgage debt by payment of smaller amount can be proved as fact if separable from any oral agreement to vary terms of mortgage — Evidence Act (1872), S. 92.**

The discharge of a mortgage represented by a mortgage-deed by the payment and receipt of a smaller amount than was due can be proved as a fact if it is separable from any oral agreement to vary the terms of mortgage contract and can be proved without the evidence of such agreement: *A. I. R.* 1929 *Mad.* 794, *Rel. on.*

[P 142 C 1]

(b) **Registration Act (1908), S. 17 (2) (11)—Endorsement of discharge on mortgage deed need not be registered.**

An endorsement of discharge on a mortgage-deed which does not on its face purport to extinguish the mortgage comes within S. 17 (2) (11) and need not be registered. [P 142 C 1]

(c) **Mortgage—Discharge — Endorsement of discharge on mortgage — Return of mortgage deed is not conclusive nor any indication that mortgage is extinguished.**

In cases where there is an endorsement of discharge on the mortgage-deed the return of the mortgage deed by the mortgagee is not conclusive nor even of itself any indication that the mortgage is extinguished: 37 *Cal.* 589; 34 *All.* 528 and 8 *M. L. J.* 269, *Ref.* [P 142 C 1]

T. R. Ramachandra Ayyar and *S. R. Dikshit*—for Appellant.

T. M. Krishnaswami Ayyar —for Respondents.

Judgment. — It is not now disputed that the discharge of the mortgage-debt represented by Ex. A by the payment and receipt of a smaller amount than was due can be proved as a fact if it is separable from any oral agreement to vary the terms of the mortgage contract and can be proved without evidence of such an agreement: *Balusundara Naicker v. Ranganatha Aiyar* (1). In this case the plaintiff pleaded such an oral agreement of 25th June 1919. But the learned Subordinate Judge found that the discharge of the mortgage by payment of Rs. 1,500 on 5th July 1919 was true without referring to the alleged agreement to vary the terms of the mortgage and without using any evidence regarding that agreement. It is objected that he used the endorsement of discharge on Ex. A, which it is contended was inadmissible in evidence because it was unregistered. But that endorsement in our opinion comes within S. 17 (2) (11), Registration Act, and need not have been registered.

Without discussing on this occasion the question whether all endorsements of payment on mortgage-deeds are exempt from registration or only those which do not purport to extinguish the mortgage we find in this case that the endorsement does not on its face purport to extinguish the mortgage. The return of the mortgage deed by the mortgagee is certainly not conclusive in such cases nor even of itself any indication that the mortgage is extinguished: *Hari Narain Banerji v. Shamasundari Dasi* (2), *Piari Lal v. Makhan* (3) and *Seshayya v. Subbamma* (4). It is also suggested for the defendants that, if the oral agreement of 25th June 1919 to vary the mortgage contract cannot be proved, the agreement made on the same occasion to assign the decree against his father-in-law to the plaintiff, on which the plaintiff sues, also cannot be proved, as they were really parts of one agreement. But, because the plaintiff cannot prove any such agreement to vary the mortgage contract by taking less than what was due on it in

full discharge, he is not necessarily shut out from proving the actual discharge of the mortgage by the payment and acceptance of a lesser amount and the payment of the balance, for which he now sues, in accordance with a separable agreement that defendant 1 should assign the decree to him.

In our opinion this appeal must be allowed and the Subordinate Judge's decree restored with costs throughout.

P.R.S./R.M.

Appeal allowed.

A. I. R. 1932 Madras 142

ANANTAKRISHNA AYYAR, J.

Ramji Das—Defendant—Petitioner.

v.

Kumarakalathi Mudali and others—Plaintiffs—Respondents.

Civil Revn. Petn. No 664 of 1928, Decided on 13th July 1931, against order of Dist. Munsif, Conjeeveram, D/- 4th February 1928.

Limitation Act (1908), S. 5—Bona fide mistake by pleader or his clerk is sufficient cause to excuse delay to file appeal—It is immaterial whether mistake is committed by pleader or his clerk.

Mistake committed by a party's vakil or the vakil's clerk which results in the filing of an appeal beyond the due date is a sufficient cause for excusing the delay under the provisions of S. 5. Whether the particular mistake has been committed by the vakil himself or the vakil's clerk is not of any material importance provided the mistake was a bona fide one committed in the course of the conduct of the case entrusted by the party to the vakil: *A. I. R. 1925 Mad. 462*; *A. I. R. 1923 Mad. 354* and *A. I. R. 1922 Mad. 186, Ref.* [P 143 C 2]

K. Bhashyam Ayyangar and *R. Desikan*—for Petitioner.

M. M. Srinivasachariar—for Respondents.

Judgment.—This is an application for revision, filed by defendant 2 in S. C. S. No. 661 of 1927 on the file of the District Munsif of Conjeeveram. A decree was passed in the suit on 17th August 1927 against defendant 2, among others, defendant 2 not appearing at the date of the adjourned hearing. On 15th September 1927, defendant 2 filed an application in the lower Court under O. 9, Civil P. C., read with S. 17, Provincial Small Cause Courts Act. Under S. 17, defendant-petitioner 2 had to deposit in Court within 30 days the amount due under the decree in question. Defendant 2 paid into the hands of his vakil on 15th September 1927 the necessary amount. The account books of the vakil

(1) A. I. R. 1929 Mad. 794=126 I. C. 641.

(2) [1910] 37 Cal. 589=6 I. C. 159.

(3) [1912] 34 All. 528=16 I. C. 179.

(4) [1898] 8 M. L. J. 269.

have been filed and they support defendant 2's plea that the necessary funds were paid into the hands of the vakil on 15th September 1927. Before the money is actually paid into the Court the party has to apply for the necessary chellan and in this case the necessary application for the chellan was made on 15th September at the time when the application under O. 9 was made, but the chellan seems to have been issued only on 28th September 1927. Unfortunately the vakil's clerk seems to have mislaid the chellan and consequently was not able to pay the money into the Treasury in time. Some amendments of the application had to be made as per orders of the Court for which some time was granted and finally on 17th October 1927 the money was paid into Court, a fresh chellan having been procured in the meantime. The decree-holder objected to the application being heard on the ground that the provisions of S. 17, Provincial Small Cause Courts Act, had not been complied with inasmuch as the decree amount had not been paid into Court within 30 days from the date of the decree in question. The learned District Munsif was however satisfied that the money had been paid by defendant 2 into the hands of the vakil in time with instructions to have the necessary steps taken in the matter. To use the words of the learned District Munsif:

"It is proved by the vakil's accounts that the money was paid to the vakil on 15th September itself and so it should have been paid into the Treasury on the date when the chellan was issued. This could not be done because the vakil's clerk had mislaid the chellan in question."

However the learned District Munsif felt himself bound to dismiss the application, because, in his view, it was only mistakes committed by the vakil that could be ground for excuse under S. 5, Limitation Act, but not a small mistake committed by the vakil's clerk. Again to use the words of the learned District Munsif:

"But here there is no carelessness on the part of the vakil; the carelessness was only on the part of his clerk."

He added:

"No decision in our own High Court has laid down that such carelessness on the part of the vakil's clerk is a sufficient ground for excusing the delay. A line must be drawn somewhere. If the carelessness of the vakil's clerk were to stand on the same footing as the vakil's carelessness why not the carelessness of the vakil's peon

or servant? I therefore think that there are no sufficient grounds for excusing the delay."

The learned District Munsif's attention was drawn to the case in *Kandasami Mudaliar v. Arunachala Chetty* (1), where an arithmetical mistake committed by a party's vakil which resulted in the filing of the appeal beyond the due date was held to be a sufficient cause for excusing the delay under the provisions of S. 5, Limitation Act. The learned District Munsif observed with reference to that case as follows:

"If the same case had arisen in Lahore perhaps the decision would have been the other way, because it was admittedly occasioned by the carelessness of the vakil, i. e., it was not done in good faith according to the decision in *Umrao Baksh v. Muhammad Khan* (2)."

Thus it is clear that while the District Munsif was of the view that as far as the merits were concerned any bona fide mistake committed by a vakil with reference to the transaction of any business entrusted to him by a litigant would be a proper ground for excusing any delay under the provisions of S. 5, Lim. Act, he felt that similar mistakes committed not by the party's vakil but by the vakil's clerk would not be any ground to excuse delay under S. 5 of the Act. I am unable to appreciate the distinction. So far as the litigant who invokes the jurisdiction of the Court to exercise its powers of excusing the delay under the provisions of S. 5 of the Act is concerned, it is not a matter of any great concern for him whether the particular mistake was committed by the pleader himself or by the pleader's clerk. If the mistake was committed with reference to this case, though by the pleader's clerk, in the usual course of business while transacting in the ordinary way the legal business of the litigant, the party should not be made to suffer because this particular mistake was committed when the papers were being dealt with in the ordinary course of business by the vakil's clerk and not by the vakil. It is clear that a vakil could not transact personally all the routine and mechanical items of business of the client in a satisfactory manner and that various matters have to be dealt with in the usual course of business by the vakil's clerk. In the present case it is clear that the chellan was mislaid

(1) A. I. R. 1925 Mad. 462=85 I. C. 114.

(2) A. I. R. 1928 Lah. 612=72 I. C. 732.

by the vakil's clerk who was dealing with the papers in the usual course of business of the vakil. No fraud or mala fides is suggested; that being so, this is a case where the party should not be made to suffer when it is clear that he had done, in proper time, everything that he was bound to do in respect of the matter. How the vakil's clerk's mistake or carelessness on the particular occasion should be dealt with is a matter between the vakil and the clerk and the finding that it was a case of the chellan being misled by a bona fide mistake is prima facie enough, so far as the party is concerned, to enable him to invoke the provisions of S. 5, Lim. Act.

The learned advocate for the respondent argued that S. 5, Lim. Act, would not apply to such cases at all. I think it is too late to raise such a contention. In *Koilpillai Samban v. Sappanimuthu Samban* (3), the learned Judge Ramesam, J., held that the provisions of S. 5 applied, and even went further and in revision himself held that the facts were enough to have the delay excused. In fact there is an earlier decision of this Court reported in the case in *Sudalimuthu Kudumban v. Andi Reddiar* (4), a decision of a Bench of two learned Judges, where it was specifically held that S. 5, Lim. Act, applies to such a case. Mr. Bhashyam, the learned advocate for the petitioner, drew my attention to the fact that in the case of *Sudalimuthu v. Andi Reddiar* (4) the mistake was one on the part of the clerk of the vakil. Of course the question did not directly arise for decision whether such mistakes committed by the vakil's clerk were such as could be dealt with under S. 5. But that only shows that the distinction sought to be made by the learned District Munsif in this case between such slips committed by the vakil on the one hand and the vakil's clerk on the other is not of any material importance, provided the mistake was a bona fide one, committed in the course of the conduct of the case entrusted by the party to the vakil. Holding then that the distinction sought to be made by the learned District Munsif is not sound, I reverse his order and excuse the delay in the presentation of the application, having regard to the

facts found in this case. The result therefore would be that M. P. No. 295 of 1927 will be remanded for disposal on the merits by the District Munsif. As regards costs, I think in such cases it is no satisfaction to the decreeholder—the other party to the proceedings—when he is put to extra trouble and inconvenience, to be told that it was because defendant 2's pleader's clerk was guilty of a bona fide mistake. In such cases I think the proper order should be that defendant 2 should be directed to pay costs to the decreeholder, both of the hearing of the application in the lower Court in February 1928 (the amount of which will be fixed by the lower Court) and of this civil revision petition. I order accordingly, and that irrespective of the ultimate decision on the merits of the main application No 295 of 1927.

P.R.S./R.M.

Order accordingly.

A. I. R. 1932 Madras 144

RAMESAM, OFFG. C. J. AND CORNISH, J.

Gorantala Parvatamma—Defendant—Appellant.

v.

Veeragandam Subbayya—Plaintiff—Respondent.

Appeal No. 453 of 1925, Decided on 13th July 1931, against decree of Sub-Judge, Bapatla, in Original Suit No. 96 of 1923.

Partition — Plaintiff wanting to include land of female member in partition suit—Female member pleading land to be her own—Plaintiff has to prove that it was purchased benami.

In a partition case wherein the plaintiff wants to include a land in the name of a female member of the family the burden of proof is upon the plaintiff to show that the land does not exclusively belong to the woman and the Court should not scrutinize and examine the defendant's case in the first instance; the plaintiff in such a partition suit must prove that a land standing in the name of a female member of the family was really purchased benami in her name for some ulterior purpose such as depriving him of his rights, and if that burden is not discharged it is unnecessary to examine the defendant's case. [P 145 C 2]

T. V. Ramanatha Ayyar—for Appellant.

B. Somayya—for Respondent.

Judgment.—This appeal by defendant 3 arises out of a suit for partition filed on behalf of the plaintiff a minor at the time of the suit by his next friend, his maternal uncle, against defendant 1, his

(3) A. I. R. 1923 Mad. 354=79 I. C. 40.

(4) A. I. R. 1922 Mad. 186=66 I. C. 104=45 Mad. 628.

uncle, defendant 2 his father, and defendant 3 daughter of defendant 1. After the suit was filed, defendant 4 was born with the result that the plaintiff's share was reduced from one-fourth to one-sixth. The plaintiff got a decree below. Defendant 3 files this appeal in respect of two items of immovable property: (1) 2 1/2 cents in item 40 of Sch. A and 2.2 acres of dry land in item 51 of Sch. A and an item of debt. Defendant 3 claimed in her written statement that the two former items did not belong to the joint family but belonged to herself. The Subordinate Judge found this point against her and gave a decree for the plaintiff in respect of these two items also. Hence she appeals. Taking these items in succession, the sale deed for the first item of 2 1/2 cents is Ex. 4. The Survey No. is 350. It originally consisted of 23 cents. A portion of this land—about 14 cents—had previously been sold to the family under Ex. 7-a in August 1910. Another portion consisting of about one-third of the land described as 8 cents was sold to the family by Ex. 7 dated March 1912. The second sale-deed mentions as the northern boundary of the land in this number

"land partly belonging to you and partly belonging to Velidantla Khotayya."

"The land partly belonging to you" is really the land already sold to the family under Ex. 7-a. The rest of the description shows that there was a small piece of land belonging to Velidantla Kotayya in this number. Velidantla Kotayya is the vendor under Ex. 4. The Subordinate Judge disbelieves the story given by him as to how he got the land. His story was that he got it in exchange for some other lands. No exchange deed was produced. The Subordinate Judge has not noticed the description in Ex. 7, a sale deed of the family, which shows that Velidantla Kotayya had a land there and the description was so early as 1912 whereas Ex. 4 was in 1922. When we find that Kotayya's title was recognized 10 years before the sale-deed Ex. 4, it is clear there is no reason to doubt his title. The Subordinate Judge committed a very serious mistake in his judgment when dealing with this item. He was under the impression that Exs. 7 and 7-a each dealt with 23 cents of

land, at any rate that after the execution of these two sale deeds there was no more land in Survey No. 350. This is clearly wrong. The first sale-deed was for 14 cents, the second for 8 cents and the third for the balance. The discrepancy between one cent and 2 1/2 cents is easily explained by the inaccuracy of measurements. It is not the case of the plaintiff that the consideration for Ex. 4, namely, Rs. 12-8-0 could not have been advanced by defendant 3's husband or by defendant 3 herself and was as a matter of fact advanced by the plaintiff's family. The whole case of the plaintiff rested upon the Subordinate Judge's finding that there was really nothing more to be sold after Exs. 7 and 7-a and that Ex. 4 is merely a new sale deed for land already sold, executed for the purpose of helping defendant 3. The moment this case falls to the ground the plaintiff's case with respect to this item falls to the ground also.

Coming to the second item: the consideration for this item is as much as Rs. 500. Defendant 3's case is that her husband got it from the lands which he obtained on division with his brothers. In a case of this sort the burden of proof is upon the plaintiff and we are not to scrutinize and examine the defendant's case in the first instance: vide *Protap v. Sarat Chandra* (1). The plaintiff must prove that a land standing in the name of a female member of the family was really purchased benami in her name for some ulterior purpose such as depriving him of his rights, and if that burden is not discharged it is unnecessary to examine the defendant's case.

Now, the family of the plaintiff and defendants 1 and 2 admittedly possessed 45 acres of cultivated land and 25 acres of pasture land. For a family possessing 70 acres it must be too paltry a transaction to attempt to purchase two acres of land and put it in the name of a daughter for the purpose of cheating one of the members even assuming that there were misunderstandings with that member. A second outstanding feature in this case is that the plaintiff's father, defendant 2, supports the case of defendant 3. So far as defendant 1 is concerned he of course supports his daughter's case and one need not at-

(1) A. I. R. 1921 Cal. 101=62 I. C. 348.

tach any undue weight to that. He is sonless and it is natural that he should support his daughter's case. But it is rather surprising that defendant 2 should support this portion of defendant 3's case when it is against his own interest and that of his other son who was born after the suit was filed merely to spite the plaintiff. But apart from these considerations what is the evidence which the plaintiff has adduced. The vendor, P. W. 9, says that defendant 1 settled the bargain; that at the time the sale-deed was executed two promissory notes, Exs. 3-a and 3-b, were also executed for the balance of consideration Rs. 100 having been previously advanced. He then says that these promissory notes were paid off by defendant 1, and his clerk Panguluri Hanumanthayya. P. W. 2 who is the next friend of the plaintiff gives evidence saying that the money was paid by defendant 1 and Panguluri Narasayya. Though it is true that Narasayya is the father of Hanumanthayya, still this is a discrepancy which militates against the evidence of these two witnesses.

But apart from this, even if P. W. 9's evidence is accepted, there is nothing in it which shows that the ownership of the money was that of defendant 1 and not of defendant 3. He says in cross-examination that he does not know to whom the money belonged. So that his evidence in examination-in-chief merely comes to this : that the hand that paid the money was that of defendant 1 and his clerk. P. W. 2's evidence is singularly unconvincing. He says that after the money was taken he made inquiries and Narasayya happened to tell him about it. Narasayya is admittedly alive and is not examined. And it cannot be pretended that he is on bad terms with the plaintiff, because he gave some information to the plaintiff. A good deal of P. W. 2's evidence is hearsay and it is impossible to accept it. That being all the evidence of the plaintiff, it is very difficult to act upon such evidence and disturb a title created by a solemn registered document. The motive for creating a benami document in favour of the daughter does not seem to be very strong. If there was such a motive, it is inconceivable that it should confine itself to a small extent of land like two acres. We are not prepared to accept

the Subordinate Judge's estimate of evidence in this case. We think the plaintiff has not made out a *prima facie* case in respect of this item and it is unnecessary to examine the evidence adduced by the defendant as to the source of the purchase money.

There is a third item claimed by defendant 3 in this appeal. That is a debt due to the family in respect of which the plaintiff claimed a share. This item is No. 6, Sch. 3, Part 2-b. The debt was due from P. W. 6. P. W. 6 himself says that the note was executed in favour of defendant 1. Defendant 1 in his evidence says that the note was transferred to somebody because he was in need of money. But all this evidence does not help defendant 3. It does not show that he is entitled to item 6, Sch. 3, Part B. If there is any other debt due by this debtor to defendant 3, this judgment will not affect her in respect of it, but certainly her claim to item 6 must be disallowed because she has established no right to it. This portion of the appeal fails, but the appeal in respect of the other two items succeeds. The plaintiff's suit in respect of the two items of immovable property will be dismissed. As the parties have succeeded equally and lost equally, there will be no order as to costs between the plaintiff and defendant 3.

P.R.S./B.V.

Appeal allowed.

A. I. R. 1932 Madras 146

CURGENVEN, J.

Muthuswami Aiyar—Defendant—Petitioner.

v.

Subramania Aiyar — Plaintiff—Respondent.

Civil Revn. Petn. No. 777 of 1928, Decided on 11th August 1931, against decree of Sm. C. C. Judge, Kumbakonam, in S. C. S. No. 2919 of 1927.

(a) Contribution — Joint decree for cost against defendants—Suit for contribution by one defendant paying full costs — He must show some equity in his favour entitling him to contribution.

Where one of the defendants pays the full amount of costs and then sues his co-defendants for contribution he must show some equity existing in his favour which will make his co-judgment-debtor liable for contribution. In this respect a decree for costs stands upon a different footing from a decree for payment of money arising out of a joint liability : 32 *All. 585, Foll.*; 95 *I. C.* 689, *Diss. from*; A. I. R.

1921 All. 372; A. I. R. 1923 All. 67 and A. I. R. 1928 Mad. 588, Dist. (Case law discussed).

[P 147 C 2]

(b) Contract Act (1872), S. 70—One defendant alone contesting suit and required to pay full cost — Other defendants are not liable under S. 70.

Where one defendant alone contests a suit and fights for his own land and has to pay full costs of the suit, no such principle as underlies S. 70 can avail him to fix a liability upon the other co-defendants.

[P 148 C 1]

T. S. Venkatesa Ayyar—for Petitioner.
R. Gopalaswami Iyengar and N. Swaminatha Ayyar—for Respondent.

Judgment.—The parties to the small cause suit out of which this civil revision petition arises were co-defendants in a previous suit. A joint decree for costs was passed against them, the amount was recovered wholly from the plaintiff, and he has claimed and obtained a decree for contribution from the four defendants. The question is whether any such claim can be supported, and if so, whether the lower Court was right in awarding a moiety of the costs paid.

There is a quantity of case law, not entirely reconcilable, upon this topic. A number of the earlier cases, such as *Sripal Singh v. Imrit Tewari* (1), *Manja v. Kadugochen* (2) and *Thangammal v. Thayyammuthu* (3) apply the test adopted in the English case, *Merryweather v. Nixon* (4), whether and to what extent the parties were tort-feasors in the prior action. Upon this principle, too, a claim was rejected by Kumaraswami Sastri, J., in *Koppana Chelamiah v. Suryanarayana Jagapathi* (5). More recently Waller, J., in *Narayanamurti v. Chandrayya* (6), has shown that the House of Lords has refused to follow *Merryweather v. Nixon* (4), Lord Herschell observing: "it is not founded on any principle of justice or equity or even of public policy which justifies its extension to the jurisprudence of other countries." Upon this ground it was discarded by the Allahabad High Court in *Parshotam Das v. Lachmi Narayan* (7), and it has not been seriously pressed upon me here. It is further conceded that the mere fact that he has satisfied a joint decree for costs will not, without more, entitle the plaintiff to con-

tribution. As to what more has to be shown, a distinction needs to be drawn between a decree for costs against co-plaintiffs and one against co-defendants. It appears to me, with respect, that this distinction has not been sufficiently kept in view by Daniels, J., in *Babu Ram v. Badri Das* (8). He expresses the view that "prima facie a right of contribution exists between persons against whom a joint decree for costs has been passed and that it is for a defendant seeking to avoid liability to show some equity which entitled him to exemption."

The two cases of his own Court which he cites in support of this proposition, *Ramsarup v. Baij Nath* (9) and *Parshotam Das v. Lachmi Narayan* (7), relate to co-plaintiffs, and in the latter case Ryves, J., recognizes that a different rule would apply to co-defendants. The objects and interests of co-plaintiffs are identical, and from their voluntary association it may be said that there arises an implied contract, which equity will enforce, to share gains and losses.

It is otherwise with co-defendants who may be forced into the position against their will, and whose interest may be adverse inter se. Upon such grounds as these it was held in *Mulla Singh v. Jagannath Singh* (10) that where one of the defendants pays the full amount of the costs, and then sues his co-defendants for contribution he must show some equity existing which will make his co-judgment-debtors liable for contribution. I think it may perhaps also be said, as the petitioner's learned advocate contends, that in this respect a decree for costs stands upon a different footing from a decree for the payment of money arising out of a joint liability. It was a decree of a latter kind which was dealt with in *Arunachalam Servai v. Varu Rowther* (11) and the observations in the judgment must be read in the light of that circumstance.

I think then that the learned Judge of the Court of Small Causes was not right in requiring defendant 1, who alone contested the suit, to show some equity in his favour which would entitle him to exemption. It is the plaintiff who must show an equity entitling him to contribution. Turning now to the facts, the prior suit

(8) [1926] 95 I. C. 689.

(9) A. I. R. 1921 All. 372=58 I. C. 324=43 All. 77.

(10) [1910] 32 All. 585=6 I. C. 684.

(11) A. I. R. 1928 Mad. 588=110 I. C. 484.

(1) [1880] 5 Cal. 720=6 C. L. R. 6.

(2) [1884] 7 Mad. 89.

(3) [1887] 10 Mad. 518.

(4) [1799] 8 T. R. 186=16 R. R. 810.

(5) [1919] 53 I. C. 77.

(6) A. I. R. 1927 Mad. 790=102 I. C. 885.

(7) A. I. R. 1923 All. 67=69 I. C. 688=45 All. 99.

was brought by an alleged nearest reversioner to recover an estate from the present plaintiff (defendant 1), who denied the reversionary right. The remaining defendants—now defendants in the present suit—were impleaded as lessees of the present plaintiff. They filed no written statement and were ex parte throughout. The present plaintiff, who alone contested, failed in the first Court and failed again on appeal. I cannot find that the course which he took was in any respect affected by the fact that his lessees were impleaded as co-defendants. He was fighting for his own land, and no such principle as underlies S. 70, Contract Act, can avail him to fix a liability upon the other defendants. Nor, except perhaps to an insignificant extent in the matter of process-fees for serving these defendants, can it be said that the costs amounted to more than he would have had to pay had they not been included. It is argued that they could have avoided inclusion in the order as to costs if they had put in an appearance and undertaken to accept any decree that the Court might pass. There is not very much difference between doing this and remaining ex parte and I cannot agree that their failure so to appear and plead necessarily entitles the plaintiff to contribution.

The order of the lower Court, which makes these defendants liable for a half-share of the costs, appears to me plainly inequitable, because they can in no way be held responsible for such items as service of process on witnesses, and subsistence allowance of witnesses, which together amounted to over Rs. 100 of the Rs. 260-2-0 awarded and are due to the contest of the present plaintiff. I should feel compelled therefore on any view to allow this petition in part. But it appears to me that, for the reasons I have indicated, the plaintiff has not succeeded in showing any such equity in his favour as will entitle him to a decree for any measure of contribution; and although only one defendant contested the suit and has preferred this petition, the conclusion must be that the plaintiff has failed in establishing the liability of any of them. I therefore allow the petition, set aside the decree of the lower Court and dismiss the suit, with costs to petitioner (defendant 1) in both Courts.

P.R.S./R.M.

Petition allowed.

* A. I. R. 1932 Madras 148

MADHAVAN NAIR, J.

(Talluri) Peda Manikyam—Plaintiff—Appellant.

v.

Vantabattina Periagadu and others—Defendants—Respondents.

Second Appeal No. 509 of 1928, Decided on 5th August 1931, against decree of Dist. Court, West Godavari, in A. S. No. 48 of 1927.

(a) Evidence Act (1872), S. 68—Suit on will—Three attesting witnesses—Two dead—Plaintiff not calling remaining witness for fear of his turning hostile—This is improper—Plaintiff has to call him to prove his will.

There was a suit upon a will which is a document required by law to be attested. There were three attesting witnesses one of whom was alive. He was not summoned nor examined by the plaintiff on ground that he was a hostile witness and hence could not be examined.

Held: that the provisions of S. 68 were mandatory and the fact that when called the said witness would prove hostile did not excuse the party producing the document from this duty of calling the said witness in order to prove his "will": 63 I. C. 266; A. I. R. 1927 Cal. 102 and A. I. R. 1925 All. 56, Rel. on.; A. I. R. 1930 Mad. 770, Dist. [P 150 C 2]

(b) Will—In suit on will plaintiff has to prove that it was executed by deceased testator.

It is incumbent in a suit based on a will on the plaintiff who relies on a will to prove that the will was executed by the deceased testator. The facts that it was registered and that it was acted upon, and relied on by the defendant, will not help him, if he has not proved that it was executed by the deceased testator. [P 150 C 2]

* (c) Civil P. C. (1908), O. 41, R. 27—Plaintiff having opportunity to adduce evidence in trial Court to prove will, but insufficient evidence produced—No fresh evidence to patch up his case can be allowed to be given by plaintiff in second appeal.

Where in the trial Court the pleadings and the issues cover the question regarding proof of execution of a will and the plaintiff has given evidence though insufficient to prove its execution the plaintiff cannot be allowed in second appeal to adduce fresh evidence as regards the execution of the will. He cannot thus be allowed to patch up the weak parts of his case and fill up the omissions: A. I. R. 1931 P. C. 143, Rel. on. [P 151 C 2]

G. Lakshmananna and G. Chandrasekhara Sastri—for Appellant.

P. Somasundaram—for Respondents.

Judgment.—One Jakkarayya, an Indian Christian, died leaving some properties by a "will". In O. S. No. 457 of 1924 the plaintiff, one of his sons, instituted a suit for a part of the properties covered by the "will" alleging amongst other things that the properties were owned by himself and by defendant 1, his brother, that their father had

no right to the properties and that he cannot dispose of them by a will. He contended that defendants 2 to 7 trespassed upon the properties. Defendant 1 supported the case of the plaintiff. Defendant 7 in the suit is the son of a deceased daughter of Jakkarayya. He contended that the properties were the self-acquisition of Jakkarayya, that they were bequeathed by Jakkarayya under a "will" to the plaintiff, defendant 1 and himself in equal shares and that the suit properties fell to his share under a partition. The plaintiff's contentions were rejected by the lower Courts and his suit was dismissed. No second appeal has been preferred against the appellate decree and we are not now concerned with the contentions raised by the parties in this litigation.

The present second appeal arises out of O. S. No. 513 of 1924 which was tried and disposed of along with O. S. No. 457 of 1924 referred to above. This suit was instituted by defendant 7 in O. S. No. 457 of 1924 for a partition of the rest of the properties of Jakkarayya which he says he got under the will but which were not divided at the previous partition referred to in O. S. No. 457 of 1924. His case is that he got a third share of the properties under the will, that most of the other properties were divided and that these properties were left undivided at the partition. Defendants 1 and 2 in the suit are the sons of Jakkarayya, defendant 1 being the plaintiff in O. S. No. 457 of 1924 and defendant 2, defendant 1 in the same suit. They and the other defendants amongst other things contended that the will left by Jakkarayya is "not valid in law": (see para. 3 of the written statement of defendants 1 to 3). Issue 6 in the case which relates to the contentions regarding the will is:

"Is the will alleged by plaintiff true valid and binding on the defendants?"

The District Munsif holding that the will is genuine and that it was executed by Jakkarayya when he was in a sound disposing state of mind decreed the suit in favour of the plaintiff. His discussion of the question is found in para. 15 of his judgment which deals with issue 1 in the connected suit. In the appeal preferred against this decree, A. S. No. 48 of 1927, the learned District Judge held that the plaintiff had not proved that the will in question was

executed by Jakkarayya and on this finding he set aside the decree of the lower Court and dismissed the plaintiff's suit. This second appeal has been filed by the plaintiff against the District Judge's decree.

Mr. Lakshmanan on behalf of the appellant contends that the learned District Judge was wrong in disposing of the case on the ground that there is no proof that the "will" was duly executed, inasmuch as that plea was not raised in the pleadings or in the issues. The defendants' contention being only that the "will" was invalid as the executant was not in a sound disposing state of mind when he executed it. He also contends that, if the District Judge thought that proof of the execution of the "will" was necessary, then he should have framed an issue on that point and remitted the case to the lower Court for fresh evidence.

The will is Ex. 1 and is dated 10th April 1907. It bears the mark of Jakkarayya, he being a marksman. There are three attestors to the will. The first attestor is Samuel, defendant 1 in the connected suit and, as already pointed out, one of the sons of the deceased Jakkarayya. The "will" was written by one Ammiraju now dead and it was registered on the very day it was executed. Evidence regarding the execution of the will is given by the plaintiff who was examined as D. W. 1 in the connected case. He states thus:

"Jakkarayya executed a will signature "Samuel" is defendant 1's The attestors Ellore Ranganayakulu and Talloori Stephen went abroad. Their whereabouts are not known."

The District Judge says that the witness at the time of the execution of the will being only 10 or 15 years old:

"his statement that Jakkarayya executed the will can at best be only hearsay evidence and cannot be taken as proof that he saw Jakkarayya execute the will."

P. W. 6 was examined to prove the signature of one of the attestors and the son of the writer of the documents speaks to his handwriting. This is all the evidence that has been brought to my notice regarding the execution of the "will." I shall first consider whether on this evidence it can be held that the plaintiff has proved that the "will" was executed; and then deal with the question whether the District Judge was

right in disposing of the case on this point without framing a fresh issue whether the will is proved to have been executed by the deceased Jakkarayya.

The deceased Jakkarayya being a Christian is governed by the Succession Act. S. 63 of the Act, which deals with the execution of wills, enumerates certain rules which the testator has to follow in executing a "will." R. (c) says that a will shall be attested by two or more witnesses, each of whom should see that the testator signs or affixes his mark to the will, etc. S. 68, Evidence Act states that

"if a document is required by law to be attested it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving such execution if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence."

From these provisions it follows that the "will" of Jakkarayya is a document required by law to be attested and if there is at least one witness alive, subject to the process of Court and capable of giving evidence it shall not be used as evidence until he has been called to prove its execution. S. 71, Evidence Act enacts that

"if the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence."

In this case though the whereabouts of two attesting witnesses are unknown it is admitted that one of the attesting witnesses is alive and is capable of giving evidence. This witness is defendant 1 in O. S. No. 457 of 1924. He has not been examined as a witness in the case, and so, even if the plaintiff saw Jakkarayya executing the "will" it cannot be said that the execution of the will has been proved unless the available attesting witness has been examined to prove its execution. Mr. Lakshmanan states that admittedly his interests are opposed to the interests of the plaintiff and that being so, no useful purpose will be served by calling him as a witness and that the plaintiff is not therefore bound to examine him in the case. This very argument was put forward in *Dhira Singh v. Moti Lal* (1), and overruled by the learned Judges of the Patna High Court. In that case the appeal arose out of a suit upon a mortgage bond, which is a document required by law to be attested. There were four attesting witnesses

one of whom was alive. He was not summoned nor examined by the plaintiff. Dealing with the argument that he was a hostile witness and could not be examined the learned Judges say that

"the fact that when called he will prove hostile does not excuse the party producing the document from this duty. The learned Subordinate Judge was therefore wrong in thinking that it was not necessary to call defendant 2."

To the same effect is the decision in *Gobinda Chandra Pal v. Pulin Behary* (2) which also deals with a mortgage bond: see also *Karimullah v. Gudar Koer*, A. I. R. 1925 All. 56. These decisions show that the provisions of S. 68, Evidence Act are mandatory and that the plea of the appellant that defendant 1, if called, will prove hostile to him will not relieve him from the duty of examining him as a witness. No doubt the plaintiff in his evidence speaks to the signature of the attesting witness, defendant 1 but that is not in law sufficient to prove that he has attested the document. So also the evidence of P. W. 6 who speaks to the handwriting of another attester does not amount to proof of the execution of the will. Mr. Lakshmanan has drawn my attention to a decision in *Ponnuswami v. Kalyana Sundara*: A. I. R. 1930 Mad. 770, in support of his contention that in certain circumstances the Court may hold that the execution of a document has been proved when the signatures of "the attesting witnesses" are proved to its satisfaction. Obviously this decision is inapplicable to the present case: for all the attesting witnesses are not dead or have turned hostile or are not available in this case and further the judgment does not deal with a document which is required by law to be attested as a mortgage or a will. It is incumbent on the plaintiff, who relies on a will to prove that the will was executed by the deceased testator. For the reasons which I have given I agree with the learned District Judge in holding that the plaintiff has failed to prove that Ex. 1 was executed by the deceased Jakkarayya. The facts that it was registered and that it was acted upon, relied on by the appellant, will not help him, if he has not proved that it was executed by the deceased testator.

The next point for consideration is whether, having regard to the pleadings and the issue in the case, the appellant

(1) [1921] 63 I. C. 266.

(2) A. I. R. 1927 Cal. 102=98 I. C. 147.

is absolved from the obligation of proving the "will" and whether the learned Judge was right in disposing of the case without giving an opportunity to the appellant to adduce evidence in proof of it. It is true that the objection that the "will" was not executed by Jakkarayya is not specifically stated in the written statement but it states in two paragraphs that the "will" is not valid in law and that the issue as framed would certainly include within its scope the proof of execution of the will as one of the points arising for decision; it is also true that a considerable portion of the evidence adduced in the case deals with the question regarding the state of mind in which Jakkarayya was when the will was executed; but I cannot agree with the appellant's contention that the parties accepted the execution of the will as an admitted fact and that the defendant's only objection was that the "will" was invalid as it was executed at a time when Jakkarayya was not in a sound disposing state of mind. That the execution of the will must be proved was present in the mind of the plaintiff appears to be clear from the evidence given by him which I have already extracted. He states that Jakkarayya executed the will. Then he says that the signature "Samuel" is defendant 1's and that the other attestors went abroad and their whereabouts were not known. Then he speaks about the writer whose handwriting is spoken to by his son. I think this evidence and the evidence of P. W. 6 regarding the signature of one of the attestors was intended—though it does not do so—to prove the execution of the will.

If the execution of the will was admitted I do not see any reason why such a detailed reference in evidence should have been made to its execution and attestors. The learned District Munsif refers to this evidence in discussing Issue 1. Though he does not give his finding specifically anywhere that the execution of the will is proved, having regard to the evidence that was given by defendant 1, I think the learned District Judge was perfectly justified in deciding the question whether there was legal proof that Ex. 1 was executed by Jakkarayya. As I have already stated it is incumbent on the plaintiff, who relies on a will and wants to enforce it, to prove that it was executed by the testator.

In this case though there is no specific issue on the point I think, the pleadings and the issue cover the question regarding proof of execution of the will and the plaintiff has given evidence though insufficient to prove its execution. The plaintiff would not examine the attester available, namely, defendant 1, as he was hostile to him, putting forward that ground as a sufficient justification in law for not calling him. By asking for permission to adduce fresh evidence as regards the execution of the will it seems to me that the appellant is now really seeking "to patch up the weak parts of his case and fill up the omissions," a procedure not warranted by the rules of the Code of Civil Procedure: see *Purso-tim Thakur v. Lal Mohar Thakur* (3). In these circumstances I cannot agree with the contention that the learned District Judge has disposed of the case on a new point raised for the first time in the Court of appeal, not covered by the pleadings or issue and on which no evidence was given. For these reasons I do not think that there is any need to frame a new issue and to send the case to the lower Court for disposal after taking evidence on it.

In the result, the second appeal is dismissed with costs.

P.R.S./B.V. *Appeal dismissed.*

(3) A. I. R. 1931 P. C. 143=132 I. C. 721=58
I. A. 254=10 Pat. 654 (P.C.).

A. I. R. 1932 Madras 151

CURGENVEN, J.

Lakshmanan Chetti—Petitioner.

v.

R. M. A. R. A. R. R. M. Arunachalam Chettiar and others—Respondents.

Civil Revn. Petn. No. 842 of 1928, Decided on 23rd September 1931, against decree of Temporary Sub-Judge, Devakottah, D/- 31st December 1927, in S. C. S. No. 512 of 1926.

(a) Contract Act (1872), S. 70—Suit for contribution for costs of repairs to property in which several persons are interested—Work must have been done in part at least for benefit of defendant—Defendant must be proved to have been in position to exercise option whether or not to avail himself of benefit.

Where a person claims contribution towards the costs of repairs of a property in which several persons have a common interest the very wide language of S. 70 should be read with the qualifications that in the first place it is not enough that the work should result in benefit to the defendant; it must have been done in part at

least for his benefit and in the second place the defendant must have been in a position after the execution of the work to exercise the option whether or not to avail himself of the benefit. No presumption arises that work in which one party is interested and which benefits another was done for that other: 18 *Mad.* 88; 33 *Mad.* 15; *A. I. R.* 1915 *Mad.* 428; 45 *I. C.* 786 and *A. I. R.* 1931 *Mad.* 51, *Rel. on.* [P 152 C 1, 2]

(b) Provincial Small Cause Courts Act (1887), Ss. 25—Decree by lower Court without advertence to case law on question in issue and without following settled judicial opinion in matter—High Court can interfere.

It is open to the High Court to interfere in revision under S. 25 if the decree has been passed by the lower Court without any advertence on the case law really bearing on the question in issue and without adopting the settled judicial opinion of the High Court as to the principles on which similar cases should be decided, as such decree is not according to law.

[P 154 C 2]

V. Ramaswami Ayyar—for Petitioner.

M. Patanjali Sastri—for Respondents.

Judgment.—The plaintiff sued for contribution under S. 70, Contract Act, towards the cost of certain repairs which he executed to the tank which irrigates the wet lands of Manavanagari, a village in the Ramnad District. Of this wet land the plaintiff owns of the whole extent 7/8ths. The petitioner before me is defendant 5 and he, with the other defendants, is a trustee of a kattalai which owns a 1/16th share, the remaining 1/16th share in the land being held by one Muhammad Ibrahimsa. The tank also is the common property of these persons in the same proportions. It had fallen out of repair, so that the supply of water for irrigation had diminished and during the years 1923 to 1925 the plaintiff replaced the old and breached bund by a new one at a cost of between Rs. 5,000 and Rs. 6,000. Towards this sum he claimed a 1/16th contribution, equal to Rs. 372-7-2, from the trustees of the kattalai. The suit was tried on the small cause side and the learned Temporary Subordinate Judge of Devakottah has given a decree for the amount on the grounds that the work was done for the benefit of the plaintiff and the defendants and that the defendants did not object, but enjoyed the advantages resulting from the expenditure. It is contended before me that this decision is not in accordance with the law and that certain conditions which are necessary before a liability to contribute can be established have not been fulfilled. In the first place, it is not enough that the work should result in benefit to the de-

fendant; it must have been done, in part at least for his benefit. In the second place the defendant must have been in a position, after the execution of the work, to exercise his option whether or not to avail himself of the benefit. I think that an examination of the case law of this Court will show that judicial opinion has now come to hold that in both these respects the very wide language of S. 70, Contract Act, should be read with these qualifications. In *Damodara Mudaliar v. Secy. of State* (1) it was pointed out that the question whether the act was done for the defendants was one which must be determined according to the circumstances of the case, for one of two persons having a common interest in property may or may not intend to act for the other in the execution of work upon the property. The fact that the latter was benefited by the work does not necessarily show that it was done for him. The case was accordingly remanded for a finding upon this point. The question of the exercise of an option to enjoy the benefit was not discussed in this case, but in *Y. B. Ammani Ammal v. Naina Pillai Marakayar* (2), both the points came under consideration. That case is authority for the view that no presumption arises that work in which one party is interested and which benefits another was done for that other. The second question, whether the defendant should have an opportunity of exercising his option to enjoy the benefit, was also discussed and Sankaran Nair, J., expresses himself strongly in favour of the view that a person can be said to enjoy a benefit under S. 70 only by accepting the benefit when he has had the option of declining or accepting it.

A different note was struck in *Sri Sri Sri Chandra Deo v. Srinivasacharlu* (3), where *Y. B. Ammani Ammal v. Naina Pillai Marakayar* (2) was subjected to some criticism; but Sadasiva Iyer, J., who was a party to the later case, in *Naraina Pai v. Appu* (4), subsequently acknowledged that the trend of decisions was against his view. Again in *Raja of Pittapur v. Secy. of State* (5), to which Sankaran Nair, J., was a party, the prin-

(1) [1895] 18 *Mad.* 88=4 *M. L. J.* 205.

(2) [1910] 33 *Mad.* 15=3 *I. C.* 110.

(3) [1915] 38 *Mad.* 235=20 *I. C.* 445.

(4) [1915] 28 *I. C.* 456.

(5) *A. I. R.* 1915 *Mad.* 428=25 *I. C.* 783.

ciple was repeated that a person cannot be made to pay for a benefit which he had not had the option of rejecting or accepting. In *Viswanatha Vijia Kumara v. R. G. Orr* (6), the facts of which very closely resemble those of the present case, both principles are discussed. "The law is not," it is said :

"that, when a person does any act for his own benefit, and that act incidentally benefits his neighbour or any other person, that neighbour or other person must pay for the extent of the benefit he derives from the act."

There was no doubt in that case that the tank had been improved by the repairs effected to it and that the defendants did in fact enjoy the benefit of those repairs. The plaintiffs however owned a preponderating interest, as the plaintiff does here, and it was held to lie upon them to show that they did not make the repairs for themselves and that they did make them for the defendants. In this they failed and the claim was disallowed. The learned Judges found it sufficient to decide the case upon that point, and refer to a difference of judicial opinion on the question whether a person to be charged must have the option of refusing or adopting the benefit. I think however as has been held recently by Madhavan Nair, J. in *Sampath Ayyangar v. Raja of Venkatagiri* (7) that this latter principle may now be regarded as well enough established. Mr. Patanjali Sastri has drawn my attention to a Privy Council case, *Luckhinarain Mitter v. Khattro Pal Singh Roy* (8), which he argues would indicate a much wider construction of S. 70. The matter related to the deposit of rent for the defendants and it was held that because the defendants had the benefit of it they were bound to reimburse the plaintiffs. The case was decided before the present Contract Act came into force and has not been relied on in any of the above-cited cases as defining the scope of S. 70. I do not think that it throws any light upon the special questions arising here.

Turning now to the circumstances of the present case, it has been said that the plaintiff owns 7/8ths of the village and the defendants only 1/16th. It is true that the case differs from some of the decided cases in the ownership of the tank being shared and not exclusively

the property of the person who undertook the repairs. But we must look, I think, rather to the matter of water-rights than of ownership. The plaintiff does not allege that the defendants were consulted before the repairs were put in hand, and I do not read a passage in the deposition of the plaintiffs' maramath superintendent, P. W. 4, as meaning more than that the defendants were informed after they were executed. Considering the large preponderance of the plaintiff's interest it certainly lay heavily upon him to show that he was actuated not solely by a consideration of that interest in doing the work. This has not been proved and I can find no reason to suppose that, even if the defendants had expressly refused to share, he would have been deterred by that circumstance.

On the second question, that of an opportunity to exercise an option, if the tank before the repairs were effected had afforded no supply of water at all, it might have been possible to argue, as has been pointed out by Sankaran Nair, J., in *Rajah of Pittapur v. Secy. of State* (5), that in using the water rendered available by the repairs the defendants exercised an option which it was open to them to refuse by not using the water. But if the repairs merely resulted in an increase of the water supply, no such clear alternative presented itself. They had to take some water, and it is not possible to differentiate between what they would have got before the repairs and what after. The evidence does not show in the present case that the water supply had wholly failed when the repairs were undertaken, although it seems clear that the bund was much broken down, breaches having formed, it is said, in 60 or 70 places. The plaintiff only states that the tank had not been properly yielding and that on account of the repairs a proper yield had been secured. This is borne out by the statements of the witnesses. It seems clear therefore that the defendants' wet land was receiving a certain supply before the plaintiff renewed the bund. Accordingly I cannot find in the circumstances of the present case that it was open to the defendant to refuse to accept the benefit.

The revision petition is preferred under S. 25, Provincial Small Cause Courts Act, and it is open to this Court to interfere if the decree is not according to law. I

(6) [1918] 45 I. C. 786.

(7) A. I. R. 1931 Mad. 51=129 I. C. 828.

(8) [1873] 13 Beng. L. R. 146=20 W. R. 380.

think that the learned Temporary Subordinate Judge has decided it without advertence to any of the case law really bearing on the questions in issue, and has not adopted what I take to be now the settled judicial opinion of this Court as to the principles on which such cases should be decided. In these circumstances I think that the decree ought not to stand. I accordingly allow the petition, set aside the decree and dismiss the suit with costs here and below.

P.R.S./R.M.

*Petition allowed.***A. I. R. 1932 Madras 154**

CURGENVEN, J.

Changat Chatu Nambiar—Defendant—Petitioner.

v.

Changat Odayothi Kunhiraman Nambiar—Plaintiff—Respondent.

Civil Revn. Petn. No. 839 of 1928, Decided on 4th August 1931, against decree of District Munsif, Cannanore, D/- 6th January 1928.

Mortgagor and Mortgagee — Mortgagee agreeing to pay part of revenue—Enhancement of revenue—Mortgagee is liable proportionally.

In the absence of a contract to the contrary it is the mortgagee and not the mortgagor, who is liable to pay enhanced assessment. The provisions of the mortgage bond must be read in the light of the general liability which the law casts on the mortgagee.

A provision in a mortgage deed that the mortgagee will pay the mortgagor "at the rate of Rs. 6 being the proportionate Government revenue for the land" should therefore be taken to mean that the mortgagee was to pay the proportionate Government revenue for the land, which at that time was Rs. 6. In any case the mortgagee must bear the burden of the doubt occasioned by any ambiguity in the mortgage document: *A. I. R. 1924 P.C. 102*; *A. I. R. 1926 Mad. 405, Ref*; *18 I. C. 844* and *A. I. R. 1915 Mad. 100, Dist.* [P 154 C 2]

O. T. G. Nambiar and *A. Atchuthan Nambiar*—for Petitioner.

N. Govindan and *K. Kutti Krishna Menon*—for Respondent.

Judgment.—I think on the merits that the learned District Munsif has come to a right decision. He has found that the defendant as mortgagee is liable on the terms of the document to pay the enhanced assessment. Several cases originating in this Court have been cited with regard to the effect of such provisions in mortgage documents, but I do not think I need go further than the Privy Council decision in *Abid Hussain*

Khan v. Kaniz Fatima (1), which makes it clear that in the absence of a contract to the contrary it is the mortgagee who is liable to pay any enhanced assessment. This case is noticed by Phillips, J., in *Vasteva Holla v. Mahabala Rao, A. I. R. 1926 Mad. 405*, together with two earlier cases, *Krishnier v. Arappauli Iyer* (2), and *Panigatan Kanaran v. Raman Nair* (3), which were in a somewhat contrary sense. That being so, we must read the provisions of the mortgage bond in the light of the general liability which the law would cast upon the mortgagee. The bond states that the mortgagee will pay the mortgagor :

"At the rate of Rs. 6 being the proportionate Government revenue for the land."

In as much as it defines specifically what the Rs. 6 is to signify it is distinguishable from the two cases *Matilal v. Darjeeling Municipality* (4), and *Kunchu Menon v. Naraynan Ezhutessan* (5), which recited only a fixed sum. It may very well be taken therefore to mean that the mortgagee was to pay the proportionate Government revenue for the land, which at that time was Rs. 6. However that may be, as I have said, I think the mortgagee must bear the burden of the doubt occasioned by any ambiguity in the mortgage document and I cannot therefore say that the learned District Munsif has come to a wrong conclusion that he and not the mortgagor is liable for this enhancement.

It is then urged that the decision in a previous suit O. S. No. 791 of 1916 renders the matter *res judicata*. It is true that the Court in that suit found, when the plaintiff sued the defendant for some earlier amounts, that the latter was liable for the assessment only at the old rates. The District Munsif has declined to hold the matter *res judicata* on several grounds, the only one which need be noticed being that the subject-matter is not the same, the claim in the present suit arising subsequent in point of time to that in the prior one. For the respondent *Broken Hill Proprietary Co. v. Broken Hill Municipal Council* (6), a Privy

(1) *A. I. R. 1924 P.C. 102*=80 *I. C. 1019*=51 *I. A. 157*=27 *O. C. 72*=46 *All. 269 (P.C.)*.

(2) [1904] 14 *M. L. J.* 488.

(3) [1907] 17 *M. L. J.* 517.

(4) [1913] 18 *I. C.* 844.

(5) *A. I. R. 1915 Mad. 100*=25 *I. C.* 641.

(6) [1926] *A. C.* 94=95 *L. J. P. C.* 33=134 *L. T.* 335.

Council decision originating in Australia and relating to the valuation of a mine in successive years for purposes of taxation has been cited. But I am not clear that that can fairly be regarded as a parallel case. While in that case the only provision common to the series of operations was a provision of law, here we have a document which has to be construed equally in the earlier case and in the later. On the other hand, I cannot find in the case relied on by the petitioner, *Bader Bee v. Habib Merican Noordin* (7), any such principle enunciated as can be applied to the circumstances of this case. I should in any event be indisposed to disturb the finding of the learned District Munsif upon this ground because it seems clear that the earlier decision is based upon an erroneous view of the law and therefore to substitute it for the present one is hardly the function of a Court sitting in revision. For these reasons I decline to interfere with the decree and dismiss the civil revision petition with costs.

P.R.S./K.N. *Petition dismissed.*

(7) [1909] A. C. 615=78 L. J. P. C. 161=101 L. T. 161.

A. I. R. 1932 Madras 155 (1)

CURGENVEN, J.

Marudachala Nadar—Plaintiff—Petitioner.

v.

Chinna Muthu Nadar and another—Defendants—Respondents.

Civil Revn. Petn. No. 857 of 1928, Decided on 2nd September 1931, against order of Dist. Munsif, Coimbatore, D/- 26th October 1927, in O. S. No. 709 of 1926.

Civil P. C. (1908), O. 23, R. 1 (2)—Application under O. 23, R. 1 (2) must be treated as indivisible.

An application under O. 23, R. 1 (2) for permission to withdraw from suit with liberty to institute a fresh suit on the same subject-matter must be treated as an indivisible whole, and if a party is not allowed liberty to institute a fresh suit, his pending suit should not be dismissed, but the application should be refused altogether and the suit should be retained on the file: 10 I. C. 346 and 32 Bom. 345, *Foll.* [P 155 C 2]

S. Muthiah Mudaliar and B. Venkataraman—for Petitioner.

T. S. Anantaraman—for Respondents.

Judgment.—The petitioner as plaintiff applied under O. 23, R. 1, sub-R. 2, Criminal P. C., for permission to withdraw from his suit with liberty to in-

stitute a fresh suit in respect of the same subject-matter. The learned District Munsif, while refusing to grant such liberty, has thought that it was open to him to accept the former portion of the application and to allow the withdrawal of the suit. I think there is no doubt that an application of this kind must be treated as an indivisible whole and if a party is not allowed liberty to institute a fresh suit his pending suit should not be dismissed, but the application should be refused altogether and the suit should be retained upon the file. This is the view taken in *Bhagwat Pershad v. Lachmi Pershad* (1), and *Mahant Biharidasji v. Parshotamdas* (2), and appears to me to be clearly reasonable. I must therefore allow the petition, set aside the District Munsif's order and direct the District Munsif to rehear and dispose of the application. As the respondent has not contested the petition before me each party will bear his own costs.

P.R.S./S.N. *Petition allowed.*

(1) [1911] 10 I. C. 346.

(2) [1908] 32 Bom. 345=10 Bom. L. R. 293.

* * A. I. R. 1932 Madras 155 (2)

JACKSON AND WALSH, JJ.

Rajagopalaswami Naicken and others—Defendants—Appellants.

v.

Palaniswami Chettiar and others—Plaintiffs—Respondents.

Appeal No. 464 of 1930, Decided on 3rd August 1931, from order of 1st Addl. Sub-Judge, Coimbatore, D/- 5th March 1930, in I. A. No. 760 of 1929 and O. S. No. 11 of 1924.

* * Civil P. C. (1908), O. 34, R. 6—Suit on mortgage decreed with costs—Property sold and balance still due—Personal decree for costs can be passed even against non-mortgagor defendant.

Where a Court decrees "if the proceeds are insufficient to pay costs", it contemplates costs remaining unpaid if any balance is left owing after the sale. When therefore a suit for sale by a mortgagee is decreed with costs and some balance is left after the hypotheca is sold the Court can pass a personal decree for costs even against the non-mortgagor defendant: *A. I. R. 1931 Mad. 272*; 17 I. C. 244 and 30 I. C. 188, *Ref.* [P 156 C 2]

K. S. Venkatarama Ayyar—for Appellants.

T. M. Krishnaswami Ayyar, T. B. Balagopal and C. V. Mahadeva Ayyar—for Respondents.

Judgment.—This is a suit for sale brought by the mortgagee against the

mortgagor, defendant 1, and his three sons, defendants 2, 3 and 4. The lower Court decreed the suit, and after the hypotheca had been sold under the decree the plaintiff applied for a personal decree against defendant 1 for the balance still due under the mortgage and costs, and against defendants 2 and 3 for the amount due for costs. The lower Court has granted a personal decree against defendants 2, 3 and 4 and hence the appeal. The point taken is that once the amount due under the mortgage, the subsequent interest and costs have been amalgamated into one sum, and the hypotheca has been sold, it is not open to the plaintiff to assume that costs are part of the remaining balance, or to ask for a personal decree for costs as though they were still legally recoverable from the defendants as provided by O. 34, R. 6. It is not contended that in no case can defendants who are not personal parties to the mortgage be held personally liable for costs. That, under S. 35, Civil P. C., would be within the Court's discretion: cf. *Ramakrishna Ayyar v. Raghunatha Ayyar* (1). But it is contended that unless in its preliminary decree the Court exercises its discretion, it is too late for the plaintiff to apply after the amalgamation of the amounts due by way of mortgage, interest and costs and the subsequent sale.

The same point is taken in *Venugopalachariar v. Padmanabha Row* (2), where the non-mortgagor, defendant 2, concedes that costs are legally recoverable from him under the decree but contends that there is no admissible assumption that the portion of the decree amount unsatisfied by the sale represents costs and not the mortgage money. While admitting (p. 121 of 29 *M. L. J.*) that in England this assumption is warranted, this Bench felt constrained by Indian Statute law to take a contrary view. It was impressed by the circumstance that in Appendix D under O. 34, R. 6 a form of decree against a mortgagor personally is provided; but this would almost assume that Appendix D is exhaustive. Can it be said that no decree can be passed for which Appendix D provides no form, or that the decretal rules in the Code are restricted to such decrees as may be found in Appendix D?

Two Allahabad cases are cited by this Bench in support of its ruling in *Ram Lal v. Sil Chand* (3) which contemplates (p. 441) a decree for costs being given against a non-mortgagor personally. No doubt, it interprets the obsolete S. 90, T. P. Act, as referring only to a mortgagor:

"the whole tenor and wording of S. 90 abundantly show that the persons affected by it are the mortgagee who has brought the property to sale, and the mortgagor, p. 440."

But that is of little assistance in interpreting O. 34, R. 6, because the wording has changed "the amount due for the time being on the mortgage" giving place to "amount due to the plaintiff," which may well include costs from a non-mortgagor. In that case (p. 441) no order had been made in the preliminary decree to the effect that the non-mortgagor should be personally liable in costs, and again in *Mata Amber v. Sri Dhar* (4) it is pointed out that the preliminary decree contained nothing justifying the application for a personal decree. Apparently that decree was in some form resembling 5 of Appendix D, Civil P. C., before its amendment in 1929; for it was a suit for redemption governed by S. 92, T. P. Act, or O. 34, R. 7, Civil P. C. In that form there is no clause such as is found in Form 4, the form of our decree

"that if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree."

Where a Court decrees "if the proceeds are insufficient to pay costs" it must contemplate costs remaining unpaid if there is any balance owing after the sale. In the present suit the mortgage amount with interest comes to over Rs. 76,000, and the costs are about Rs. 3,000. It is an ingenious fiction but one to which a Court can hardly lend colour that the mortgage amount, interest and costs are as it were piled into one heap, with the costs at the top, and then the moment that some bidder at the sale has offered Rs. 3,000, the costs are cleared off, and only the mortgage amount and interest at the bottom remain to be defrayed. The heap as a matter of fact consists of "what is declared due to the plaintiffs" (para. 2 of the decree), and if a portion of the heap remains not cleared off after

(1) A. I. R. 1931 Mad. 272=131 I. C. 151.

(2) [1915] 30 I. C. 188.

(3) [1901] 23 All. 439=(1901) A. W. N. 131.

(4) [1904] 26 All. 507=(1904) A. W. N. 73=1 A. L. J. 250.

the sale it is still "what is declared due to the plaintiffs"; and if costs are declared due to the plaintiffs, they are justified in treating this residue as costs, and in applying under para. 3 for their personal decree. Any other interpretation would seem to make para. 3, Form 4, a dead letter as regards non-mortgagor defendants.

This was evidently the opinion of another Bench of this Court reported in *K. Kamalammal v. K. Narasimhacharlu* (5), and if this be read with *Venugopalachariar v. Padmanabha Row* (2) it cannot be said that there is any binding authority upon this question to be found in the rulings.

In this view of the law we see no reason to interfere with the lower Court's judgment. The plaintiffs did not ask for a personal decree against defendant 4 and apparently do not want one, but it follows logically upon the argument that makes defendants 2 and 3 personally liable and it must stand. Only defendant 4 will not be liable to arrest. The appeal is dismissed with costs.

P.R.S./R.M. *Appeal dismissed.*

(5) [1912] 17 I. C. 244.

A. I. R. 1932 Madras 157

CURGENVEN, J.

(*Ardhikai*) *Lakshamma*—Plaintiff—Petitioner.

v.

Gorle Appadu and another — Defendants—Respondents.

Civil Revn. Petn. No. 873 of 1928, Decided on 10th August 1931, against decree of Dist. Munsif, Parvathipur, in O. S. No. 237 of 1926.

(a) Arbitration—Suit referred to arbitration—One arbitrator remaining absent—Award is illegal—Party though present allowing proceedings to go on and terminate cannot subsequently object to award.

Where the suit is referred to arbitration and one of the arbitrators remains absent during the examination of one of the witnesses, the award is illegal even though the parties agree that the opinion of the majority should be accepted, for it is one thing to say that and quite another thing to say that the parties agreed that the arbitration might be conducted by a majority or less than a full number of arbitrators. But if the party is present and does not object at the time and allows the proceedings to go on and terminate it is too late for the party, after the award has been made and on its application to file its award to insist on this objection to file the award; 8 I. A. 209 (P.C.) and 12 Mad. 113, *Rel. on.* [P 157 C 2]

(b) Civil P. C. (1908), S. 115—Arbitration proceedings—Mere illegality without substantial harm does not justify interference.

Revision is generally objectionable in cases of awards and a Court should not interfere unless it finds not only illegality but some substantial harm resulting from that illegality. 29 Cal. 767 (P.C.), *Foll.* [P 158 C 1]

S. Subramanya Sastri—for Petitioner.

Y. Suryanarayana—for Respondents.

Judgment.—This was a suit to arbitration and the finding of fact is that out of five arbitrators one was absent during the examination of one of the witnesses. The learned District Munsif is of opinion that the terms of reference provided for such a contingency inasmuch as the parties agreed that the opinion of the majority should be accepted. But it is one thing to say that and quite another thing to say that the parties agreed that the arbitration might be conducted by a majority, or by less than the full number of arbitrators. This view of the lower Court has not been supported here and it must be found on the authority of *Thammiraju v. Bapiraju* (1), that it was incumbent on each of the arbitrators to be present at each of the meetings and that accordingly, if the master stood there, the award would be liable to be set aside as illegal. The learned District Munsif has however also found that, if there was any irregularity from this cause, the plaintiff has waived it. He notes that the plaintiff's next friend was present on each occasion and has admitted that he took no notice of the circumstance that one of the arbitrators was on one occasion absent. It was his business to object at the time and not to allow the proceedings to go on and terminate. The principle has been laid down by the Privy Council in *Chowdhri Murtaya Hussain v. Bibi Beehunissa* (2) at p. 220. The appellant, their Lordships say,

"having a clear knowledge of the circumstance on which he might have founded an objection to the arbitrators proceeding to make their award, did submit to the arbitration going on and allowed the arbitrators to deal with the case as it stood before them, taking his chance of the decision being more or less favourable to himself, and it is too late for him, after the award has been made, and on the application to file the award, to insist on this objection to the filing of the award."

This seems to me to be precisely that the plaintiff's next friend did, and I cannot say that in accepting his conduct

(1) [1889] 12 Mad. 113.

(2) [1875] 3 I. A. 209=26 W. R. 10 (P.C.).

as an answer to the objection the learned District Munsif has gone beyond the discretion vested in him. There is clearly no question here of exceeding his jurisdiction.

Exception is then taken to the manner in which the arbitrators have dealt with the B and D schedule properties. As regards the B schedule property, it is said that they have not decided as between the plaintiff and the defendants to whom it belongs and as regards the D schedule, that their decision was in conflict with admission actually made by the defendants. It is to be observed however that these objections were not taken in the memorandum filed by the plaintiff upon the award and I see no reason accordingly why I should allow them to be taken now.

It only needs to be added that the Privy Council have held in *Ghulam Khan v. Muhammad Hussain* (3), that revision is generally objectionable in cases of awards, and I think that on the principles laid down in that case a Court should not interfere unless it finds not only an illegality committed but some substantial harm resulting from that illegality. I have not in any way been shown how the latter condition is satisfied. The Civil revision petition is dismissed with costs.

P R S./P.N. Revision dismissed.

(3) [1902] 29 Cal. 167=29 I. A. 51=8 Sar. 154 (P.C.).

* A. I. R. 1932 Madras 158

ANANTAKRISHNA AYYAR, J.

In re *Paturu Venugopalayya*—Plaintiff—Petitioner.

Civil Revn. Petn. No. 1181 of 1931, and Civil Misc. Petn. No. 4055 of 1931, Decided on 17th September 1931, against order of Sub-Judge, Nellore, D/- 20th August 1931, in O. S. No. 22 of 1931.

* Court-fee—Alternative reliefs of different values—Court-fee only on one yielding higher court-fee need be paid.

Where the reliefs are prayed for in the alternative, plaintiff need not pay separate court-fee in respect of each of the reliefs claimed in the plaint. Where the value of the one relief is higher than the value of the other alternative relief but the court-fee payable on the first relief being one for declaration is less than on the second relief, the court-fee on the second relief has to be paid: 15 Bom. 82; 6 Bom. 302; 44 I. C. 143; A. I. R. 1925 Pat. 193 and A. I. R. 1926 Lah. 467, Ref. [P 159 C 2]

Ch. Raghava Rao—for Petitioner.

Judgment.—This civil revision petition has been filed by the plaintiff in an original suit pending on the file of the Additional Subordinate Judge of Nellore. Objection was taken by the defendants as regards the sufficiency of the court-fee paid by the plaintiff, having regard to the prayers contained in the plaint. The plaint was once amended; some of the reliefs originally claimed were deleted. As regards the prayers contained even in the amended plaint, the defendants contended that the proper court-fee had not been paid by the plaintiff. That preliminary question had to be decided by the learned Subordinate Judge, and after hearing parties he came to the conclusion that the court-fee paid by the plaintiff was not sufficient, and gave the plaintiff some time to pay the deficient court-fee. On the allegation that the court-fee already paid was sufficient, and that the learned Subordinate Judge's order was erroneous in so far as it directed the plaintiff to pay additional court-fee the plaintiff has filed the present civil revision petition. There is also an application for stay of further proceedings in the suit in the lower Court.

To appreciate the arguments urged on behalf of the petitioner, it is necessary to understand what exactly are the prayers contained in the plaint as amended. The plaintiff asks for two reliefs, the first relief being the main relief prayed for, and the second relief being an alternative relief claimed in case the Court should hold that the plaintiff is not entitled to the first relief. The reliefs claimed in the plaint are:

(1) Declaring the plaintiff's rights after setting aside the sale in favour of defendants 5 and 7 to the half-share of the properties in Schs. (a) to (e); or, in the alternative, (2), to the entirety of the properties in Sch. (a), (b) and (c) with a right to account from defendant 1 for the income thereof and collections thereunder from 1918, together with interest thereon, and for plaintiff's share of the moveables in Sch. E, to be ascertained on an accounting by defendant 1.

The first relief was valued at Rs. 49,986, and the fixed court-fee of Rs. 100 payable for a declaration was paid.

The second relief was valued at Rupees 47,022-0-9; but no court-fee was paid in respect of the same, though ad valorem

court-fee has ordinarily to be calculated on that amount.

The plaintiff's contention is that as the valuation of the first relief is more than the valuation of the second relief, he is bound to pay only the court-fee of Rs. 100 payable in respect of the higher valued relief.

The defendants argued that the plaintiff should pay separate court-fee in respect of each of the reliefs. The learned Subordinate Judge overruled the defendants' contention, and he held that the case before him was one where alternative reliefs only were claimed, and that court-fee need be paid only in respect of the relief which appears to be of the higher value. In deciding the amount of court-fee to be paid he held that ad valorem court-fee should be paid on the valuation of the second of the reliefs claimed, and as the court-fee payable in respect of that relief would be more than the court-fee paid in respect of the first relief, he directed, as I understand his order, the plaintiff to pay the difference.

Before me it was argued by the learned advocate for the plaintiff (petitioner) that the value put on the first relief is higher than the value put in respect of the second relief, and that the fixed court-fee of Rs. 100 payable in respect of relief (1) should be held to be the proper court-fee payable on the plaint.

The lower Court has held that the present is not a case coming under S. 17, Court-fees Act. The lower Court has also held that the present is a case of alternative reliefs in respect of the same cause of action. The plaintiff should have no cause for complaint so far. The real question then is how the court-fee is to be calculated in the case of alternative reliefs. My attention was drawn to the cases reported in *Kashinatha Narayan v. Govinda*, (1) *Motigavari v. Pranjivan Das* (2), *Mukhlal Gir v. Ramdhayan Rai* (3), *Dasarate Meshy v. Jay Chand* (4) and *Raja v. Muttalli* (5).

Melvill, J., remarked in *Motigavari v. Pranjivan Rai* (2) as follows:

"As regards the alternative relief sought, the larger of the two reliefs sought must determine the amount of the stamp."

The learned advocate for the peti-

tioner argued that the valuation of the first relief is larger than the valuation of the second, and as the plaintiff has paid proper court-fee in respect of the first prayer, he contended that under the ruling of Melvill, J., that "the larger of the two reliefs sought must determine the amount of the stamp," the court-fee already paid is correct. I have read the ruling referred to by the learned advocate, but I am not satisfied that the contention raised on behalf of the petitioner is correct. If the plaintiff in the present suit had asked for the second relief only, then it is clear (and this was admitted by the learned advocate for the petitioner) that the plaintiff will have to pay ad valorem court-fee on the valuation of that relief. Merely because the plaintiff has asked in the plaint another alternative relief also (in the present case the first relief) in respect of which the court-fee payable is less, I fail to see how the plaintiff gets exemption from paying the court-fee payable in respect of the former relief for which he has to pay a higher court-fee. If S. 17, Court-fees Act, should apply, then the plaintiff will have to pay the aggregate amount of the fees chargeable in respect of each of the subjects which the suit embraces; but where S. 17 does not apply, the plaintiff need not pay separate court-fee in respect of each of the reliefs claimed in the plaint, if the reliefs claimed are only in the alternative; so long as any relief is claimed, whether solely or in the alternative the plaintiff will have to value the same, that is he will have to value each of the reliefs to decide the court-fee due in respect of each, but as he does not get all the reliefs claimed, he has to pay only the highest amount of court-fee chargeable in respect of any of the alternative reliefs. If the court-fee payable in respect of one prayer is X Rs. while that payable in respect of another prayer is 2X Rs. the plaintiff will have to pay a court-fee of only 2X Rs. He is not bound to pay X + 2X or, 3X Rs. and it would not be sufficient if he pays a court-fee of only X Rs. so long as another alternative prayer in respect of which court-fee of 2X Rs. is payable is contained in the plaint.

Ordinarily the court-fee payable in respect of the larger of the two reliefs would exceed the court-fee payable in

(1) [1891] 15 Bom 82.

(2) [1881] 6 Bom. 202.

(3) [1918] 44 I. C. 143.

(4) A. I. R. 1925 Pat. 193=78 I. C. 530.

(5) A. I. R. 1926 Lah. 467=96 I. C. 826.

respect of the smaller of the two reliefs; and that was all that was presumably meant by the learned Judge in *Motigavari v. Pranjivan Rai* (2).

In *Raja v. Muttali* (5) the learned Judges held that where a plaint prays for one of the two reliefs in the alternative based on one cause of action, the larger of the two reliefs determines the value of the claim.

In *Dasarate Meshy v. Jaychand* (4) the Court held that where two reliefs are identical in actual money value, but different in respect of court-fees leviable on each, then the amount of court-fee payable is to be determined on the relief carrying the higher court-fee.

The difficulty arises because in respect of some reliefs only a fixed court-fee is payable whatever might be the valuation, whereas, in respect of other reliefs, court-fee is payable *ad valorem*. Calculating court-fee according to the provisions of the Court-fees Act, we have to see what is the court-fee payable in respect of each of the alternative reliefs claimed in the plaint. The plaintiff need not pay the total (aggregate) of these court-fees as the prayers are only alternative. If the court-fee due in respect of each prayer be the same, he will have to pay only one set of court-fee; but if the court-fee payable in respect of any of these alternative prayers should exceed the court-fee payable in respect of the other alternative prayer, then the plaintiff will have to pay the higher court-fee.

One can imagine a case where a declaration is prayed for in a suit in the Munsif's Court (the court-fee for which would be Rs. 15), and also an alternative relief for payment of Rs. 60 (for which the court-fee would be only Rs. 6-11-0.) In such a case, if the petitioner's contention be upheld, the plaintiff need not pay court-fee as for the declaration but need pay a court-fee of Rs. 6-11-0 only.

The principle applicable in such cases would seem to be that the greater should be taken to include the less, and when the higher court-fee payable in respect of any of the reliefs prayed for in the plaint has been paid, the lower court-fee ordinarily payable in respect of the other relief need not be also paid, if the reliefs are prayed for only in the alternative.

I do not consider that in arriving at this conclusion the principle that taxing statutes should be strictly construed,

and, in cases of doubt, in favour of the subject and against the Government, is contravened; for in the present case, where only alternative reliefs have been asked, the plaintiff is not asked to pay court-fee on each of the prayers, but is only asked to pay the court-fee due on one of the reliefs, and he is excused from paying any court-fee on the other on the ground that as he has paid the larger court-fee he need not pay any further court-fee.

In this view, as I understand the order of the lower Court, the plaintiff should have no grievance, and the order directing payment by the plaintiff of the excess court-fee is, in my opinion, right. I accordingly decline to interfere with the lower Court's order and dismiss the revision petition.

Civil Misc. Petn. No. 4055 of 1931.

The application for stay of proceedings follows and is also dismissed.

P.R.S./P.N.

Revision dismissed.

A. I. R. 1932 Madras 160

BEASLEY, C. J. AND CORNISH, J.

Municipal Council of Vizagapatam—Appellant.

v.

Tea Districts Labour Association—Respondent.

Original Side Appeal No. 108 of 1929, Decided on 17th September 1931, against decision of Waller, J., D/- 1st October 1929, in C. S. No. 721 of 1928.

(a) Madras District Municipalities Act (1920), S. 92—Benefit Society—For assessment it need not carry on business for profit within Municipality.

It is not necessary that before a benefit society can be assessed under this Act it should carry on business within the Municipality for profit. [P 161 C 1, 2]

(b) Madras District Municipalities Act (1920), S. 92—"Paid up capital" explained—Benefit Society without paid up capital cannot be assessed.

The words in S. 92 "paid up capital" mean so much of the authorized or stated capital of a company which its shareholders or subscribers have paid up. The subscriptions of the members of an association to the association are the "income" and not the capital of the association. There is a distinct difference between income and capital. The legislature has chosen to say that where a company or a benefit society carries on business within a Municipality it is to be assessed on its paid up capital. But if the company or the benefit society has no paid up capital it follows that it cannot be assessed. [P 161 C 2]

B. Satyanarayana—for Appellant.

C. Krishnaswami Ayyar—for Respondent.

Beasley, C. J.—This is an appeal from the judgment of Waller, J. The facts of the case are as follows: The respondent association, namely, the Tea Districts (supply) Association is an association of persons formed for certain purposes, the main purpose being to gather recruits for tea estates for various parts of India and one of the gathering grounds being in or close to the appellant Municipality. The objects of the association are fully set out in the Memorandum of the Association and its Articles. The Association is contributed to by its members who pay a subscription on a fixed scale and a capitation fee of Rs. 5 for each recruiter and Rs. 12 for each recruit. Each estate which is represented in the association makes an advance of Rs. 75 to cover the expenses of the recruiters. For the moment, we prefer to call these payments by the members of the association their contributions. The Association has a branch in the appellant Municipality and under S. 92, Madras District Municipalities Act (5 of 1920), the appellant Municipality assessed the respondent association to companies tax for the half-years ending 30th September 1925, 31st March 1926 and 30th September 1926 and served upon the respondent association notices demanding payments of the sums of Rs. 125 for each of the half-years already mentioned making a total sum of Rs. 500. The respondent association paid the amount demanded under protest and stating that they would file a suit in due course for the recovery of the amount paid by them under protest. The amount is a small one, but as the respondent association had been similarly assessed by other Municipalities this suit and the other suits were, by order of the High Court, transferred here for a decision. Waller, J., allowed the respondent's suit because he held that the respondents were not assessable under S. 92, Madras District Municipalities Act, by reason of the fact that they had no paid-up capital. Upon all other points he appears to have been in favour of the appellants.

The only point argued before us here to-day was whether the respondent association had a paid-up capital, upon which it could be assessed. It is important to observe that the words used in S. 92 are "paid-up capital". Admittedly this is not a company but a mere benefit society; and it is not necessary—and so Waller,

J., has held—that before a benefit society can be assessed under this Act it should carry on business within the Municipality for profit. What we have to deal with here is the question as to whether or not the respondent association has any paid-up capital upon which it can be assessed. Mr. B. Satyanarayana, in his very able argument contends that the contributions by the members to which we have already referred constitute the paid-up capital of it. He argues that it is quite clear that the association carries on business within the limits of the appellant Municipality. He further argues that no association or company can carry on business without capital so to do and that any money it derives from its own members or from outside must necessarily be the capital of the company with which to transact business.

He argues that it is not right, as our learned brother Waller, J., in the Court below did, to give a strict interpretation to the words appearing in the section, namely "paid-up capital," and invites us to give to those words a liberal construction and hold that any money received by a company, a benefit society or an association which enables it to carry on its business must necessarily be capital. We are of the opinion that Waller, J., was quite right in applying to those words the technical meaning which usually is applied to those words. We find them in the section in question used in relation to a company and we decline to apply any other meaning to those words "paid-up capital" than that which is usually applied to them. Paid-up capital means so much of the authorized or stated capital of a company which its shareholders or subscribers have paid-up. In this case it appears to us that the contributions of the members of the association were in no sense capital. They were the subscriptions of the members of the association to the association and as such were the "income" and not the "capital" of the association. There is a distinct difference between "income" and "capital" and in our view this was the income of the association which enabled it to carry on its business within the limits of the appellant Municipality. The legislature has chosen to say that where a company or a benefit society carries on business within a Municipality it is to be assessed on its paid-up capital. But if the company or the benefit society

has not paid-up capital it follows that it cannot be assessed. Under these circumstances, in our view, the judgment of Waller, J., in the Court below was quite correct. This appeal must therefore be dismissed with costs.

P.R.S./B.V.

Appeal dismissed.

A. I. R. 1932 Madras 162

MADHAVAN NAIR AND JACKSON, JJ.

Pulli Goundan—Petitioner.

v.

Kumaraswami Goundan and others—Respondents.

Civil Revn. Petn. No. 334 of 1930, Decided on 3rd September 1931, against order of Dist. Judge, Coimbatore, D/- 1st November 1929, in I. A. No. 208 of 1928.

Provincial Insolvency Act (1920), S. 75—Order in insolvency proceedings—Appeal by creditor not party to it but aggrieved by such order is maintainable.

Though a creditor, who is an aggrieved person, because of an order passed in an insolvency proceeding, has been a stranger to such proceeding in which the said order has been passed, still he has a right to appeal against that order under the provisions of S. 75; *A. I. R. 1923 Cal. 786, Rel. on.* [P 162 C 2]

A. C. Sampath Ayyangar and T. R. Srinivasa Iyer—for Petitioner.

B. Sitarama Rao for M. Krishna Bharathi—for Respondents.

Jackson, J.—There must be a distinct finding by the District Court whether or not the withdrawal of the petition under S. 68, Provl. Insol. Act, was collusive, and whether the appeal under S. 75, Provl. Insol. Act, to the District Court is bona fide and not merely in the insolvent's interest.

The District Court of Coimbatore may take fresh evidence. Time for the submission of the finding is six weeks and ten days for objections. (After the findings were received the following judgment was delivered by):

Madhavan Nair, J.—The purchaser of the properties from the Official Receiver of one Karuppa Goundan's estate is the petitioner before us. In I. A. No. 208 of 1928 one of the creditors filed an application before the Subordinate Judge of Coimbatore under S. 68, Provl. Insol. Act, to set aside the sale. This application was not pressed and was dismissed. Another creditor took this order in appeal before the learned District Judge under S. 75, Cl. (1) of the Act and the

District Judge ordered that the application should be restored to file and inquired into by the Subordinate Judge. This Court directed the District Judge himself to go into the merits of the application and submit findings of two questions, viz., (1) whether or no the withdrawal of the petition under S. 68 was collusive and (2) whether the appeal under S. 75 of the Act to the District Court was bona fide and not merely in the insolvent's interest. The District Judge has now submitted his findings that the withdrawal was collusive and that the appeal under S. 75 was a bona fide appeal. The correctness of these findings has not been challenged before us.

What is argued on behalf of the appellant is that the appeal to the lower appellate Court by the creditor who filed the appeal was incompetent, inasmuch as he was not a party to the application under S. 68 filed before the Subordinate Judge and that since he was a stranger to that application he was not competent to prefer the appeal under S. 75. This argument was pressed before the learned District Judge also. He overruled the argument. The question has to be decided with reference to the terms of S. 75, Cl. (1), Provl. Insol. Act, which are as follows:

"The debtor, any creditor, the receiver or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction by a Court subordinate to a District Court may appeal to the District Court and the order of the District Court upon such appeal shall be final."

The terms of the section are very wide. Under this section any aggrieved person may prefer an appeal against an order passed by the Judge in insolvency. It is not contended that the creditor who preferred the appeal before the District Judge having regard to the facts and the findings is not an "aggrieved person" within the meaning of the term, the only contention being as we have said, that he was a stranger to the proceedings. In our opinion, though the creditor who preferred the appeal was not a party to the proceedings, still having regard to the fact that he is aggrieved by the order appealed against, he would come within the terms of S. 75 and would be entitled to prefer the appeal.

Section 8, Cl. (2), Presidency Towns Insolvency Act, gives a right to "any per-

son aggrieved" to prefer an appeal against an order passed by the Judge in insolvency. In this respect the language of that section is similar to the language used in S. 75, Provl. Insol. Act. In a case in which that section had to be considered it was pointed out by the learned Judges of the Calcutta High Court in *Sarat Kumar Roy v. Nabin Chandra Ram Chandra Shah* (1), at p. 679 (of 56 Cal.) that the permission given to a person who is not a party to an order to prefer an appeal on the ground that he is an aggrieved person is a peculiarity of the Insolvency Act, inasmuch as proceedings in bankruptcy will affect not only parties thereto but also other people: see also the observations in *Chowdappa Gounder v. Katha Perumal Pillai* (2).

We have no doubt that under S. 75, Cl. (1), Provl. Insol. Act, respondent 1 in the present case was competent to prefer the appeal to the lower appellate Court. In these circumstances we dismiss the revision petition with costs.

P.R.S./B.V. *Revision dismissed.*

(1) A. I. R. 1928 Cal. 786=115 I. C. 39=56 Cal. 667 (F. B.).

(2) A. I. R. 1926 Mad. 801=96 I. C. 944=49 Mad. 794.

A. I. R. 1932 Madras 163

CURGENVEN, J.

Andiappan Ambalam and another—
Petitioners.

v.

*Subbayya Ambalam and others—*Res-
pondents.

Civil Revn. Petn. No. 507 of 1931, De-
cided on 30th September 1931, from order
of Sub-Judge, Devakottah, D/- 16th De-
cember 1930, in I. A. No. 569 of 1930.

Civil P. C. (1908), O. 1, R. 8—Five men al-
leged to be managers of certain community
sued in representative capacity under O. 1,
R. 8—Suit based on pro-note effected by these
men and for community—Suit held main-
tainable.

Where a suit under O. 1, R. 8, is brought
against five persons alleged to be managers of a
certain community and where the suit is based
on a pro-note effected by these persons and al-
leged to be for the purposes of the community
O. 1, R. 8, can be applied and these men should
be allowed to be sued in the representative capa-
city under O. 1, R. 8: *Walker v. Sur*, (1914) 2
K. B. 930; 36 Mad. 414 and *Ideal Films, Ltd. v.*
Richards, (1927) 1 K. B. 374, Ref.

[P 163 C 2; P 164 C 2]

*M. Patanjali Sastriar—*for Petitioners.
S. Varadachariar and K. S. Venkata-
*rama Ayyar—*for Respondents.

Judgment.—This revision petition has
been brought against an order of the
Subordinate Judge of Devakottah passed
under O. 1, R. 8, Civil P. C., allowing
the defendants in O. S. No. 80 of 1930,
on his file to be sued as representative of
a community known as the Karaikudi
Nattars which comprises, I understand,
some 300 pattadars. The plaintiff in that
suit, now respondent, holds a promissory
note for Rs. 25,000, executed by five per-
sons who, he alleges, were managers ap-
pointed by the community and invested
with such powers as borrowing and deal-
ing with the common property, etc. Four
of these five executants he has impleaded
as defendants 1 to 4. Defendant 5 is
said to be the adopted son of the remain-
ing manager and defendant 6 is defen-
dant 5's natural father, while defendant
7 is a receiver in a suit which is simul-
taneously proceeding for the partition
of common properties. The petitioners
before me are defendants 8 and 9, mem-
bers of the Nattar community, who say
that they got themselves impleaded in
the suit in the interests of the commu-
nity and who resist the order now under
consideration.

The principal argument employed
before me is that a suit against repre-
sentative defendants cannot be brought
upon a debt, as it is not possible to pro-
ceed against the common property unless
all those who possess an interest in the
property are actually made parties to the
suit. This, no doubt, as a general pro-
position, is true enough and may be ac-
cepted on the authority of an English
case, *Walker v. Sur* (1). In that case an
action was brought for fees for profes-
sional services rendered to an unincor-
porated religious society, and as repre-
sentatives of that society four persons
were impleaded as defendants. It was
not contended that these four persons
were chosen for any special fitness to
represent the society, and partly for that
reason and partly because the society's
property could not be proceeded against
otherwise than in the presence of all the
members of the society, the application
was disallowed. I think it is clear that
the decision does not necessarily apply to
a case in which managers or trustees or
some other persons whom plaintiff alleges
had power to bind the property of

(1) [1914] 2 K. B. 930=83 L. J. K. B. 1188=
109 L. T. 888=30 T. L. R. 171.

the association or community are before the Court. In fact Vaughan Williams, L. J., expressly bases his decision upon grounds of that nature, and I gather from what the learned Lord Justice says that if managers of the body had been before the Court he might have taken a different view as to the application of the corresponding English provision for constituting a representative suit. Buckley, L. J., approaches the question from the point of view of the assessability of the property and there again I think that if persons had been before the Court who were competent to represent the property the objections which he took would lose their force. It has been said in *Sahib Thambi v. Hamid* (2) at p. 417 that

"the general rule of law, undoubtedly, is, that in suits where one person is allowed to represent others as defendant in a representative capacity any decree passed can bind those others only with respect to the property of those others which he can in law represent."

Accordingly, I think that the circumstance that the managers or the representatives are sued in the present case may get over the difficulty with regard to proceeding against the property. The circumstances of the case more closely resemble those which arose in *Ideal Films, Ltd. v. Richards* (3). That was a suit brought against an unregistered association for articles supplied, and the committee of the association were made defendants on behalf of all the members and the trustees were also impleaded as representing the property. The suit accordingly was a representative one so far as the committee was concerned and it also comprised parties whose presence enabled the property to be proceeded against. The argument used in the present case is that the managers were competent to contract the debt on behalf of the community and were also competent in so doing to bind the property. That has been made the subject of issues in the suit and it is unnecessary and indeed undesirable for me to express any opinion upon it. It may be that if the managers were so competent there was no need to go further than to sue them. But at the worst, it can only be said that it may not have been necessary to resort to O. 1, R. 8. That is not the same as to

say that in the circumstances it could not be applied. I think that the main objection which is raised by Mr. Patanjali Sastri on behalf of the petitioners, namely, the question of the liability of the common property, is one which can only be decided in the suit, and issues have been framed for a complete inquiry in that respect. No substantive rights have been lost by defendants or those whom they represent in allowing a suit to be brought in this form. It is merely a matter of processual expediency. I can accordingly find no sufficient ground to interfere with the lower Court's order and I dismiss the revision petition with costs.

P.R.S./B.V.

Revision dismissed.

A. I. R. 1932 Madras 164

CURGENVEN, J.

Guruvammal—Petitioner.

v.

Arumuga Padayachi and others—Respondents.

Civil Revn. Petn. No. 1033 of 1930, Decided on 30th July 1931, against order of Dist. Judg., South Arcot, D/- 16th April 1930.

Madras Hindu Religious Endowments Act (1927), S. 78—District Court can decide on merits of resistance and pass appropriate orders—District Court can reopen ex parte order.

Section 78 lays down that the Court may order delivery to a person producing the Board's order of appointment when such a person is resisted in, or prevented from obtaining possession. It gives the District Court the opportunity of deciding upon the merits of the resistance which, in order to get such an order, the applicant has to allege. The Court of the District Judge is charged with the duty of executing the Board's orders, and if an order in execution results in the dispossession of a third party, it should be within his competence to investigate the matter and pass such orders as may appear appropriate. When a duty of a particular character is cast upon an established Court, it imports that the ordinary incidents of the procedure of that Court are to attach.

Where an ex parte order is passed by the District Court on the authority of the order of the Board of Revenue giving possession of property, alleged to be the property of a trust fund without really inquiring into the question of title the Court has jurisdiction to reopen the case and adjudicate it on merits at the instance of the party prejudicially affected by that order.

[P 167 C 1]

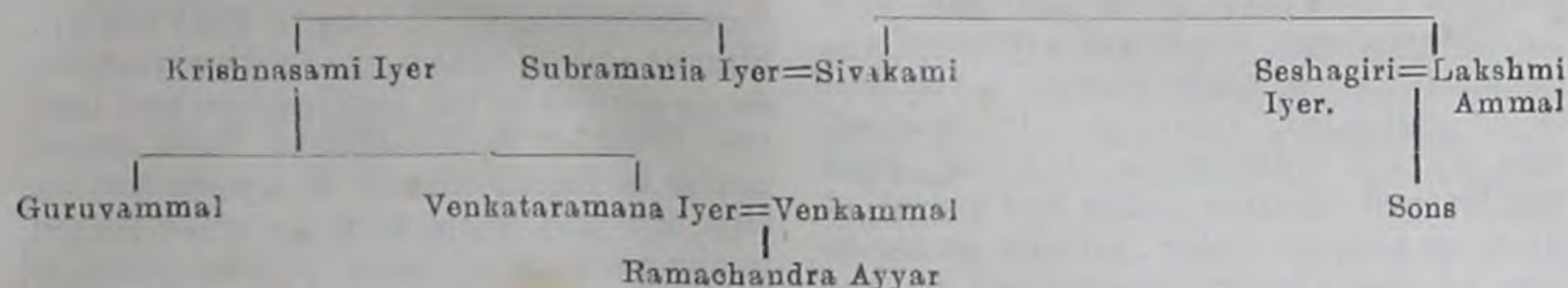
(2) [1918] 36 Mad. 414=12 I. C. 1006.

(3) [1927] 1 K. B. 374=96 L. J. K. B. 161=136 L. T. 295=70 S. J. 1133=43 T. L. R. 7.

T. V. Ramanatha Ayyar — for Petitioner.

S. T. Srinivasa Gopalachari — for Respondents.

Judgment. — The following table shows how the parties whose names occur in these proceedings are connected:



Subramania Ayyar died in 1899 leaving a will bequeathing the land now in dispute to his nephew Venkataramana Aiyar. By a codicil he gave his widow Sivakami Ammal a life interest in it. Another bequest was of a sum of money to form a trust fund, of which Sivakami was during her lifetime the self-constituted trustee. The widow survived Venkataramana Aiyar, and she too made a will, and in it she declared that Venkataramana Iyer had told her before his death, that she might include the land in the trust already created. After her death in 1924, on the strength of the allegation in this will that the property was trust property, Venkataramana Iyer's sister Guruvammal applied to the Religious Endowments Board for an order under S. 42 of the Act (2 of 1927) appointing her to discharge the duties of the trustee, and under S. 77, for an order allocating the income of the endowment between religious and charitable purposes. The Board passed orders accordingly. The order appointing Guruvammal was challenged a little later by Sivakami's brother's widow and her sons, on the ground that Sivakami had nominated them as trustees in her will; but the order already passed in Guruvammal's favour was substantially confirmed. This lady then proceeded to apply to the District Court, under S. 78 of the Act, to be put in possession of the trust property. In her application she named a number of respondents, among them being Sivakami's brother's widow and her sons, who had contested her appointment before the Board, and one Arumugam Padayachi, said to be the lessee of the property now in dispute. The learned District Judge ordered notice to the respondents, but no notice was issued, because he subsequently acceded to a representation of the petitioner's *vakil* that

no notice was necessary. Ex parte orders were accordingly passed directing delivery, symbolical in the case of the property now in question, which was in the occupation of a tenant.

Then arose opposition from another quarter. Matters had proceeded so far on the footing that the property was trust property. Venkataramana Iyer's widow and her alleged adopted son disputed this, denying that Sivakami had received from Venkataramana Iyer any such permission as her will alleged to treat the property as trust property. These persons claimed the land as their own, and not unnaturally complained that the proceedings before the Board and the District Court had taken place behind their backs. They accordingly asked the District Judge to set his previous order aside and dismiss Guruvammal's application. The matter came before the successor to the learned District Judge who had passed the previous order. He has treated the application as sustainable upon the analogy of O. 21, R. 100, Civil P. C., and has posted the case for evidence. Against this order Guruvammal has preferred this civil revision petition, and the point for decision is whether the District Judge was right in reopening the matter.

Now it is in the first place apparent that neither the order of the Board appointing Guruvammal, nor the order of the District Court directing delivery to her, is binding upon the respondents, who were no parties to these orders. The respondents' learned advocate would go further, and criticize both orders as improper, the Board's, because it did not satisfy itself that the property was in fact a religious endowment, the District Court's, because it failed to exercise judicially the discretion vested in it

by S. 78. As the Board's order is not under direct attack, I do not propose to examine its jurisdiction to pass such an order. As regards the order of the learned District Judge, S. 78 lays down that the Court may order delivery to a person producing the Board's order of appointment when such person "is resisted in, or prevented, from obtaining possession." It is unfortunate, I think, that the learned District Judge was prevailed upon to pass his order without notice to any of the respondents named in the application. The section appears to me to give the Court the opportunity of deciding upon the merits of the resistance which, in order to get such an order, the applicant has to allege. This is conceded on behalf of the petitioner here, the Court acts not merely administratively but judicially, and, on cause being shown, may refuse to enforce the Board's order. Such a position was in fact impliedly conceded by the presence of an array of respondents in the application. It is noteworthy however that the names of the present respondents were conspicuous by their absence, and I cannot absolve the petitioner from attempting to get possession of the property without raising the eminently disputable question of the allegation of entrustment contained in Sivakami's will. Although these persons were ignored however included among the respondents was Arumugam Padayachi, whom they claim as their own tenant, and it seems probable that had notice gone to him the question of title might still have been brought up for inquiry.

The question then is: an order having been passed in these circumstances, whether the Court has jurisdiction to reopen it and adjudicate upon the respondent's claims. There are no doubt technical difficulties in the way of holding that O. 21, R. 100, Civil P. C., will operate proprio vigore, nor does the learned District Judge invoke it otherwise than by analogy. His Court is charged with the duty of executing the Board's orders, and if an order in execution results in the dispossession of a third party, it should be within his competence to investigate the matter and pass such orders as may appear appropriate. When a duty of a particular character is cast upon an established Court, it imports, in the words of Lord Haldane, L. C., in *National Tele-*

phone Co. Ltd. v. Postmaster-General (1), "that the ordinary incidents of the procedure of that Court are to attach."

But I think his right to take such a course may, at least in the circumstances of the present case, be put upon still broader grounds. I take it that the applicant should have made the respondents parties to her application, and that the District Judge should have issued notice to them. There is ample authority for the view that an order passed in the absence of such preliminaries is voidable or void as against them. In *Painter v Liverpool Gas Co.* (2) it was held that a distress warrant issued without notices was illegal, Lord Denman, C. J. referring to *Harper v. Carr* (3) where Lord Kenyon said:

"It is an essential rule in the administration of justice that no man shall be punished without being heard in his defence; the party must be summoned before a warrant of distress is granted . . . ; and on that summons many circumstances may appear to show that a warrant of distress ought not to be granted."

In *Krishnasami Panikondar v. Ramaswami Chettiar* (4) the Privy Council had to consider the effect of an order passed ex parte excusing the delay in presenting an appeal, and decided that it was open to the respondent to obtain a reconsideration of the order:

"It must therefore in common fairness be regarded as a tacit term of an order like the present that though unqualified in expression it should be open to reconsideration at the instance of the party prejudicially affected."

So here we may, I think, read into the District Judge's ex parte order the implication that it will be subject to any objections to which the act of delivery may give rise. Another Privy Council case which declares the inherent power of the Court to rectify a mistake inadvertently made is *Debi Baksh Singh v. Habib Shah* (5). I do not think that it will do for the Court to refuse to take such a course on the ground that the party damnified may recover his legal rights by suit. As was laid down in *Syed Tuffuzzool Hossein Khan v. Rughunath Parshad* (6) it is the duty of the Court

(1) [1913] A. C. 546=82 L. J. K. B. 1197=109 L. T. 562=57 S. J. 661=15 Ry. & Can. Traff. Cas. 109=29 T. L. R. 637.

(2) 111 E. R. 478.

(3) 7 Tern. Rep. 270=4 R. R. 440.

(4) A. I. R. 1917 P. C. 179=43 I. C. 493=45 I. A. 25=41 Mad. 412 (P. C.).

(5) [1913] 35 All. 331=19 I. C. 526=40 I. A. 150 (P. C.).

(6) [1870] 14 M. I. A. 40=7 B. L. R. 186=2 Sar. 656 (P. C.).

to give redress. I think accordingly that the learned District Judge has acted rightly in entertaining the respondents' application, and I dismiss the civil revision petition with costs.

P.R.S./K.N. *Petition dismissed.*

A. I. R. 1932 Madras 167

BEASLEY, C. J. AND CORNISH, J.

N. Chinnappa Mudaly and others—Appellants.

v.

Official Assignee of Madras—Respondent.

O. S. Appeal No. 30 of 1931, Decided on 18th September 1931, against decision of Waller, J., D/- 16th September 1930.

(a) *Presidency Towns Insolvency Act (1909), S. 7—S. 7 as amended by Act 19 of 1927 only applies to S. 36 (4) and (5) and to no other matters.*

Under the Act of 1927 the amending S. 7 of the Act of 1909 merely refers to such proceedings under S. 36 as come under sub-Ss. 4 and 5. sub-S. 4 deals with simple money claims. sub-S. 5 deals with the examination of persons supposed to be in possession of some property of the insolvent. sub-S. 5 does not touch the case of a person who is examined in order to discover whether the insolvent was or was not a member of a joint family or whether the business carried on by him was a joint family business. That is quite outside the scope of sub-Ss. 4 and 5. S. 7 of the Act as amended by S. 2, Act 19 of 1927 only applies to matters appearing in sub-Ss. 4 and 5, S. 36 and to no other matters: *A. I. R. 1929 Mad. 705, Dist.*

[P 168 C 1]

(b) *Practice—Appeal—Insolvency Court's or trial Court's conclusion based on evidence—Appellate Court should not lightly upset it.*

It is not proper for an appellate Court, where there is evidence and where the trial Judge on the original side or Insolvency Court comes to a conclusion upon the facts, to lightly upset such conclusion. [P 168 C 2]

T. R. Vijiaraghavachariar—for Appellants.

V. V. Srinivasa Ayyangar—for Respondent.

Beasley, C. J.—This is an appeal from an order of Waller, J., sitting in insolvency. The Official Assignee put in an application in the Insolvency Court for a declaration that the business of N. Chinnappa Madaliar & Sons, was the joint family business of the insolvent, his father, and the respondents to the application, and that the deed of partition entered into by them was void as against him, and for an injunction restraining the respondents from alienating any of

the joint family property. Waller, J., held that there was a joint family, that with the exception of some property the property was joint family property and that the yarn business carried on was the joint family business. The present appeal is against that order.

Before Waller, J., apart from fact, the point of law was raised that the Official Assignee was not entitled to make an application under S. 7, Presidency Towns Insolvency Act, because he had at an earlier stage examined the father of the insolvent and one of the brothers. That examination was for the purpose of ascertaining whether the status of joint family was subsisting and whether the business carried on was a joint family business. It was contended before Waller, J., that under S. 7, Presidency Towns Insolvency Act, as amended by Act 19 of 1927, once there having been an examination of these two persons and a denial by them that there was a joint family and that this was a joint family business, the jurisdiction of the Insolvency Court was ousted; and in support of this argument a Full Bench decision of this Court, viz., *Official Assignee of Madras v. Narasimha Mudaliar* (1), was quoted. I myself was a member of that Full Bench. Waller, J., held that that case arose directly under S. 36 (4) of the Act, the supposed debtor not admitting indebtedness to the insolvent. That was the case of a simple money claim made by the Official Assignee against a person alleged to be indebted to the insolvency or the insolvent's estate; and what the Court was there considering was an appeal from an order of Waller, J., who had decided that, in so far as the person against whom the claim was made admitted the claim, a decree could be passed against him but that in so far as he disputed the claim proceedings could not be taken against him, in the insolvency Court and therefore declined to pass a decree against him. That decision the Full Bench upheld.

In view however of the importance of the question as to whether or not in a simple money claim, when the garnishee in the proceedings has been examined under S. 36, and has disputed the claim, he can have proceedings brought against him under S. 7 of the Insolvency Act, we

(1) *A. I. R. 1929 Mad. 705=118 I. C. 506=52 Mad. 717 (F. B.).*

were asked to decide that point and accordingly we did. Throughout the decision in that case the only case in contemplation was the case of a simple money claim; so that upon this point the Full Bench decision has no application at all and Waller, J., quite properly so held. Before us it was argued that what the amending section (S. 2, Act 19 of 1927) says is that where an inquiry has been held under S. 36, and where the person questioned at such inquiry is unwilling for the matter to be decided, it cannot so be decided under S. 7 of the Act. That, in my view, is far too wide an interpretation to be put upon the amending section. In my view, the amending section merely refers to such proceedings under S. 36 as come under sub-Ss. 4 and 5. Sub-S. 4 of course deals with simple money claims. Sub-S. 5 deals with the examination of persons supposed to be in possession of some property of the insolvent. In my view, sub-S. 5 does not touch the case of a person who is examined in order to discover whether the insolvent was or was not a member of a joint family or whether the business carried on by him was a joint family business. That, in my view, is quite outside the scope of sub-Ss. 4 and 5. In my opinion, S. 7 of the Act as amended by S. 2, Act 19 of 1927, only applies to matters appearing in sub-Ss. 4 and 5, S. 36 and to no other matters. That being so, Waller, J., was quite right in holding that the application under S. 7 against all the respondents was a proper one.

We have further of course to consider the question as to whether he was right on the facts in holding: (1) that this was a joint family and that the insolvent was a member of it; and (2) that the yarn business was a joint family business. Those three questions were pure question of fact. The learned Judge had before him the witnesses and had also before him certain documents and it is quite futile to contend on behalf of the appellants that there was no evidence—indeed he had ample evidence before him—upon which to come to the conclusion of fact which he did, namely, that this was a joint family, that the insolvent was a member of it and that the yarn business was a joint family business. Produced in the case there was the partition deed. That the learned Judge has found to be a

fraudulent one and he set it aside. Obviously it was a fraudulent one. It came into being only a year before the insolvency failed to disclose as family debt any of the debts set out in the schedule and was a contrivance clearly to defeat the creditors of the insolvent. It placed the entire debt upon the insolvent's shoulders and allowed the other members of the family to go away with the bulk of the property which otherwise would have been in the possession of the Official Assignee for the benefit of the creditors.

The partition deed begins by stating that up to that time the status of joint family existed. That we are asked to say was an incorrect statement that the joint family was not in existence and that as a matter of fact the members of the joint family had years before divided themselves. We are asked to say that the statement was due to the mistake of a petition writer. That of course is a perfectly futile argument to address to us. The partition deed was signed by all the members of the family, the signatures were witnessed and the document was registered, and in view of that statement there was ample evidence before Waller, J., to say that this was a joint family. There was also other evidence to show that it was a joint family business. The account books of the yarn business were produced and they clearly showed that payments were made to the other members of the family. There being evidence before Waller, J., upon which he could come to the conclusion that this was a joint family, and that it was a joint family business, we decline to consider the question as to whether or not he came to a right conclusion. I do not think it is proper for an appellate Court where there is evidence and where the trial Judge on the original side or insolvency comes to a conclusion upon the facts to lightly upset such conclusion. That being so, this appeal must be dismissed with taxed costs.

Cornish, J.—I entirely agree. The appellant's argument seems to go to this length: that whenever the Official Assignee has held an examination under S. 36, he can have no recourse to the provisions of S. 7, but must have the matter which has to be determined decided in a suit. That startling result, which could never have been contemplated by the legis-

lature, can, I think, be avoided by giving, what seems to me, the natural construction to S. 7. The section, as amended, provides that the insolvency Court can decide all questions arising in any case of insolvency, provided that, unless all parties otherwise agree, the power shall be exercised in the manner and to the extent provided by S. 36 for the purpose of deciding any matter arising under S. 36. What are the matters arising for decision under S. 36? They are contained in sub-Ss. 4 and 5, namely, whether a person supposed to be indebted to the insolvent is so indebted, and whether a person suspected of having in his possession property belonging to the insolvent has in fact any such property in his possession. If the person supposed to be a debtor to the insolvent or to have insolvent's property in his possession does not admit the fact, then, unless all the parties otherwise agree, the insolvency Court cannot determine the matter under S. 7. But questions whether the insolvent is a member of a joint family, or whether the business carried on by the insolvent is a business of the joint family, are not, in my opinion, matters falling within sub-Ss. 4 or 5, S. 36, and they can be decided by the insolvency Court in the exercise of its powers under S. 7.

P.R.S./B.V. *Appeal dismissed.*

A. I. R. 1932 Madras 169

CURGENVEN, J.

Alwar Aiyangar—Plaintiff—Petitioner.
v.

Subramania Dikshathar and others—
Defendants—Respondents.

Civil Revn. Petn. No. 207 of 1931, Decided on 19th August 1931, against order of Dist. Munsif, D/- 25th August 1930, in I. A. No. 137 of 1930.

Civil P. C. (1908), S. 47—Court attaching debt cannot inquire into existence of truth of debt—Civil P. C. O. 21, R. 58.

There is no provision of law in force according to which the Court can investigate the existence or truth of an alleged debt which it attaches either before judgment or in execution : A.I.R. 1926 Rang. 175 and 28 All. 262, *Foll.*; 27 Mad. 67 (F.B.), *Dist.* [P 169 C 1]

K. V. Sessa Ayyangar—for Petitioner.

S. Nagaraja Iyer—for Respondents.

Judgment.—The question which arises in this case is whether a Court attaching a debt either before judgment or in execution can inquire into the truth or the existence of the debt. The attach-

ment in the present instance was made before judgment on an application filed on the same day as the plaint. But I cannot find that it makes any difference whether such an attachment was made before judgment or in execution of the decree, and it appears to me that Rr. 7 and 8, O. 38, Civil P. C., show that the Court has the same powers in the one case as in the other. There is no authority arising in this Court upon this point. The Full Bench decision in *Chidambara Pattar v. Ramaswamy Pattar* (1) related to a disputed title to a debt, which it was held could be investigated under the old section of the Code now corresponding to O. 21, R. 58. This decision does not deal with the question of investigating the actual existence of the debt itself. There are however two cases upon this point decided by other High Courts *Ma Saw Yin v. Hockto* (2), and *Maharaja of Benares v. Patraji Kunwar* (3). Both the Rangoon and the Allahabad High Courts have held that it is not for the Court to determine whether the debt is actually due or not. It has to attach the alleged debt and thereafter there are only two courses open to it, either to sell the debt or to appoint a receiver to realize it. In this state of the case law I propose to follow these decisions and to hold that there is no provision of law in force at present according to which the Court can investigate the existence of an alleged debt which it attaches. I am informed that the Allahabad and Rangoon High Courts have now framed rules relating to garnishee proceedings such as have been framed on the original side of this High Court, but we have no such rules for the other Courts of this Presidency.

I was in some doubt whether I should interfere in the circumstances of the present case; but it seems to me that the Court has clearly exercised a jurisdiction which it did not possess and that the decree-holder is entitled to have matters restored to the position in which they stood before the petition was dismissed on 25th August 1930.

I accordingly allow the petition, set aside the District Munsif's order and direct him to proceed with the applica-

(1) [1904] 27 Mad. 67 (F.B.).

(2) A. I. R. 1926 Rang. 175=97 I. C. 247=4 Rang. 100.

(3) [1905] 28 All. 262=(1905) A. W. N. 277.

tion according to law. The petitioner will get his costs in this Court.

P.R.S./R.M.

Petition allowed.

A. I. R. 1932 Madras 170

CURGENVEN AND CORNISH, JJ.

G. Sirur—Petitioner.

v.

R. Mythili Ammal and others—Respondents.

Civil Misc. Petn. No. 3605 of 1931, Decided on 10th September 1931, against order of High Court, D/- 13th February 1921, in O. S. Appeal No. 63 of 1930.

(a) Civil P. C. (1908), O. 41, R. 10—High Court—Power to restore appeal dismissed.

An appeal dismissed under Rr. 10 and 12, O. 41, can be restored by the High Court: *A. I. R. 1928 Mad. 964, Rel. on.* [P 170 C 2]

(b) Civil P. C. (1908), O. 41, R. 10 (2)—Application to restore appeal dismissed under O. 41, R. 10 (2), is governed by Limitation Act (1908), Art. 168.

An application to restore an appeal dismissed under R. 10 (2), O. 41, Civil P. C., is governed by Art. 168, Limitation Act. Failure to furnish security comes under the general description of "want of prosecution." [P 170 C 2]

(c) Insolvency—Insolvency is not a disability under Limitation Act.

Insolvency is not a disability under the Limitation Act and the Official Assignee cannot have longer time to apply to set aside the dismissal of an appeal than the insolvent himself.

[P 170 C 2]

(d) Civil P. C. (1908), O. 41, R. 10 (2)—R. 10 (2), O. 41 is mandatory.

Rule 10 (2), O. 41 is of mandatory character and if security is not furnished within the time allowed, the Court is bound to reject the appeal: *A. I. R. 1921 P. C. 80, Foll.* [P 171 C 2]

V. V. Srinivasa Iyengar for *M. E. Rajagopalachariar*—for Petitioner.

T. M. Krishnaswamy Ayyar and *G. Rajagopalan*—for Respondents.

Order.—This is an application by the appellant in O. S. Appeal No. 63 of 1930, to set aside the dismissal of that appeal as against respondent 1, and to review or set aside certain interlocutory orders passed in the same appeal. The appeal was from a judgment of Waller, J., dated 15th October 1929, annulling the adjudication of respondent 2 and directing the appellant to pay respondent 1's costs. It was admitted on 1st September 1930 and on 8th November, respondent 1 applied for a direction that the appellant should furnish security for her costs in the appeal. The application was allowed *ex parte* on 19th December, no one appearing on behalf of the appellant, who was directed to give the required security within one month from that date.

On the last day of that period, 19th January 1931, an application was filed on behalf of the appellant (C. M. P. No. 548 of 1931) to rescind this order. That also was dismissed for default on 10th February, again no appearance being put in for the appellant. On 13th February the appeal itself was dismissed under the provisions of sub-R. 2, R. 10, O. 41, Civil P. C. It is this last order which the appellant primarily attacks, and in order to do so he pleads that the order of 10th February cannot be sustained because on the previous day, the 9th, he was adjudicated insolvent and, further, that he had sufficient cause for not appearing before the Court when the original order to give security was passed on 19th December.

It is indisputable that before the Court can set aside the orders of 10th February and 19th December it must restore the appeal itself, as unless the appeal is pending there can be no revival of the interlocutory applications, which depend for their existence upon the pendency of the appeal. As regards the restoration of the appeal the appellant has been met by the defence of limitation. There has been some difference of judicial opinion as to whether an appeal dismissed under R. 10 (2), O. 41, can be restored. It was held in *Srinivasan Pillai v. Rukmani Ammal* (1), to which one of us was a party, that this could be done and for the purpose of this case we propose to assume the power. It seems clear however and indeed has not been seriously disputed before us that such an application must be governed by Art. 168, Limitation Act, which provides for the re-admission of an appeal dismissed for want of prosecution. This article for appeals corresponds, we think, to Art. 163 for suits and the latter article expressly refers to dismissal for failure to furnish security for costs. It is reasonable to hold that such a failure comes under the general description of "want of prosecution." If this is correct the appellant had 30 days within which to apply and it is not disputed that his application was 41 days out of time. It has been vaguely suggested that the adjudication of the appellant affected this question but in what manner has not been explained. Insolvency is not a disability under the Limitation

(1) *A. I. R. 1928 Mad. 964=117 I. C. 791.*

Act and there is no reason to hold that the Official Assignee would have had a longer time within which to apply than the insolvent himself. We think accordingly that this objection is fatal.

The insolvency of the appellant is also the ground upon which we are invited to set aside or review the order of 10th February, which dismissed for default an application to set aside the ex parte order directing the appellant to furnish security for costs. The point taken is in brief that the appellant was disqualified by his adjudication from conducting the application and that the Court before dismissing it ought to have given the Official Assignee an opportunity to carry it on. The cases relied on by Mr. V. V. Srinivasa Iyengar for this position, *Lekhraj v. Shamlal Naraondas* (2), *Kissen Gopal Karnani v. Suklal Karnani* (3), *Khunni Lal v. Rameshar* (4) and *Official Assignee of Rangoon v. Chidambaram Chetty* (5), may be distinguished by the circumstance that in all of them the Court when it passed its order had been apprised of the insolvency. It had therefore an opportunity to apply the provisions of O. 22, R. 8, Civil P. C. In the present case this was not so. As has been stated, no appearance was put in and the Court was wholly unaware that the applicant had been adjudicated. On the materials before it therefore it had no alternative but to dismiss the application. It may be that in the peculiar circumstances of the case the Official Assignee could not reasonably have been expected to carry on the proceeding but we have no information about that, and can only proceed upon the general principle that some one representing the applicant must have appeared to save the application from dismissal for default. We think therefore that no grounds have been shown for restoring this application, though we prefer to rest our decision upon other and perhaps more conclusive reasons. Even had the application been restored it is highly doubtful whether the time within which to furnish security having expired, the Court was competent to take any action other than to dismiss the

appeal. The mandatory character of O. 41, R. 10 (2) has been stressed by the Privy Council in *Sabitri Thakurain v. Savi* (6), which was a closely analogous case. If security is not furnished within the time allowed, the Court is bound to reject the appeal. The petitioner might of course have applied for an extension of the time, or in some other way averted the operation of the order for security.

Even if it be assumed that the original order to give security could be re-opened by this means, we can find no ground whatever on the merits for holding that the appellant had sufficient reason for failure to put in an appearance. Admittedly his agent in Madras received notice of the application in good time, and he had no lack of professional advice because the applicant's affidavit states that his agent informed Mr. Venkatavaradachari's clerk to request him to instruct Mr. K. Bhashyam Ayyangar to oppose it. Having done that the agent, like his principal, was taken away from Madras by other interests. Mr. Venkatavaradachari, it is said, fell ill and his clerk was under the impression that the case would be taken by Mr. Bhashyam Ayyangar. The blame is thus thrown upon the clerk of the appellant's advocate, who apparently had been left to arrange that this application should be opposed. We think it is clear that both the applicant and his agent had other matters to attend to and neglected to ensure that the application was opposed. In the circumstances they do not, we think, succeed in proving their own diligence by throwing the blame upon an advocate's clerk, and we are unable upon the facts asserted to agree that there is any case for setting aside the ex parte order. The result accordingly is that the application is dismissed with taxed costs.

P. R. S./R. M. *Application dismissed.*

(6) A. I. R. 1921 P. C. 80 = 60 I. C. 274 = 48 I. C. 76 = 48 Cal. 481 (P. C.).

A. I. R. 1932 Madras 171

BEASLEY, C. J. AND CORNISH, J.

In re *Somasundara Mudaliar* and others—Petitioners.

Civil Misc. Petn. No. 4516 of 1931, Decided on 29th September 1931.

(a) Madras District Municipalities Act (1920), S. 45 (1) (c)—Objection to inclusion

(2) [1892] 16 Bom. 404.

(3) A. I. R. 1927 Cal. 76 = 98 I. C. 781 = 53 Cal. 844.

(4) A. I. R. 1922 All. 361 = 64 I. C. 52 = 48 All. 621.

(5) [1921] 61 I. C. 300.

on ground of fraud or illegality—Powers of revising authority stated.

If an objection is made that a person whose name is included in the electoral roll is not an assessee then all that the Revising Authority can enquire into is the fact whether he has been assessed. The question whether the assessee has been illegally or improperly assessed is a matter which does not lie within the scope of the Revising Authority. [P 173 C 1]

(b) *Certiorari*—Distinct remedy open to party—No writ of *certiorari*.

Where a distinct remedy is open to party aggrieved by an order, it is abuse of the process of the Court to approach High Court for issue of a writ of *certiorari*.

S. Jagadisa Ayyar—for Petitioner.

Beasley, C. J.—This is an application for a writ of *certiorari* upon the Revising Authority of the Saidapet Municipality commanding them to send up to this Court the records relating to certain objections to the preparation of the electoral roll and to quash the proceedings of the Revising Authority of 25th September 1931. What happened was that when the election officer was preparing the electoral roll objection was put in to the inclusion therein of certain names by the petitioner and those interested with him. The objection was that the names of some persons which were included ought not to be included because although they were assessed to taxes, they were not properly so assessed. This means, of course, that the Election Officer was called upon to embark upon an inquiry into the correctness or otherwise of the assessment of these persons by the Municipal authorities. Despite this objection of the petitioner, the names were included in the electoral roll. Objection was then preferred to the Revising Authority under the Act and the following order was passed by that Authority :

"In these cases objection has been taken to the inclusion in the electoral roll of the voters concerned on the ground that they had been improperly and illegally assessed to profession tax. We have heard arguments on both sides and are of opinion that having regard to S. 45 (1) (c), District Municipalities Act, 1920, as it stands at present it is enough that the voters concerned were assessed in the preceding year." That concluded the matter so far as the Revising Authority was concerned. We have before us the affidavit of the petitioner and we notice amongst other things that in para. 12 the allegations are that the names of these persons have been fraudulently inserted or caused to be inserted at the instance of the Chairman with a view to secure as many votes as

possible for himself or his nominees in the coming elections, that these persons were not getting the incomes allotted to them, nor were they in a position to pay the rates, that they were not even made aware of their assessments, that the taxes were paid by some unknown persons and without the authority or knowledge of those alleged to have been made so liable, that the payments did not appear to have been the assessee's own acts and that at an earlier stage when these matters were represented to the election authority some inquiry was made and it was elicited that the said assessments were behind the back of the assessee. In my view, the Revising Authorities took the proper view and were quite right in saying that as the names of these persons appeared on the assessment rolls of the Municipality, it was not competent for them, or indeed the Election Officer, to question the legality of such assessment. Were it otherwise, it would lead to this very strange position.

A person is assessed by the Chairman or the assessing officer of a Municipality to profession tax and has to pay the tax. According to the argument addressed to us for the petitioner it would be open to the person, notwithstanding that he has been assessed by the proper authority, to go before the Election Officer when the electoral roll is being prepared and contend that he has been improperly assessed and to get from the Election Officer, who after all is not the assessing officer, a decision to the effect that he has been wrongly assessed, so that we have this remarkable position : if that argument is right, that the person is both assessed and not assessed. Which authority he is to be guided by has not been stated by the learned counsel who supports this petition. Obviously that would lead to a chaotic state of affairs. In my view, it is not open to the Election Officer or the Revising Authority to go into that question at all. The Act is perfectly definite with regard to persons who are entitled to have their names included in the electoral roll. To be included in the electoral roll a person must have attained the age of 21 in the year preceding such publication, he must be a British subject or a subject of a State in India, he must have been assessed for the preceding year to any tax payable to

the Government of India or the Local Government or to any local authority in the Presidency of Madras and he should have resided in the Municipality for 120 days in the year preceding. Directly he satisfies the Election Officer on those points, the Election Officer is bound to put his name in the electoral roll. In this case it is quite clear from the affidavit supporting the petition that it is alleged that it was not due to any mistake that the persons objected to were assessed but due to deliberate fraud on the part of the Chairman of the Municipality and those interested with him. If that is so, then clearly any subsequent election at which these allegations are proved and in which it is shown that the person who was elected colluded with those who brought about such things, and so secured election can be set aside. There is this distinct remedy given to the petitioner here. That being so, he cannot come by way of certiorari here. This is yet another instance of how the process of the Court is abused by persons. This petition must be rejected.

Cornish, J.—I entirely agree. I think it is clear from the rules that under R. 8, all that the Revising Authority can inquire into are claims or objections relating to inclusion in the electoral roll. Among the qualifications for inclusion in the electoral roll set out in S. 45 (1) (c) of the Act, is the qualification that a person shall have been assessed in the preceding year to any tax. If a person claims that he has been assessed and that his name should appear on the electoral roll, then it is for the Revising Authority to inquire into that claim, and, if satisfied that the claimant has been assessed, to put his name on the roll. On the other hand, if an objection is made that a person whose name is included in the roll is not an assessee, then all that the Revising Authority can inquire into is the fact whether he has been assessed. The question whether the assessee has been illegally or improperly assessed is a matter which does not lie within the scope of the Revising Authority's inquiry.

P.R.S./V.B.

Petition dismissed.

A. I. R. 1932 Madras 173

SUNDARAM CHETTY, J.

Gurusami Thevan—Defendant—Appellant.

v.

Ganapathi Chetti and others—Plaintiffs—Respondents.

Second Appeal No. 1199 of 1927, Decided on 18th September 1930, against decree of Sub-Judge, Ramnad, in A. S. No. 62 of 1926.

(a) Civil P. C. (1908), S. 100—Question if presumption is rebutted or not is question of fact.

The question whether a presumption is rebutted or not is a question of fact to be determined according to the circumstances of each case. [P 174 C 1]

(b) Civil P. C. (1908), S. 100—Evidence properly admitted—Conclusion though erroneous on question of fact cannot be interfered with.

It is open to the lower Court to appreciate the evidence in the best manner according to its discretion, and where evidence has been properly admitted on both sides, even if its conclusion on a question of fact is erroneous, it cannot be interfered with in second appeal. [P 174 C 1, 2]

(c) Interest—Post diem—Mortgagee to enjoy property in lieu of interest for five years after which it was to be redeemed—Mortgagee dispossessed without payment of principal can be allowed interest even after five years.

Where under the deed of mortgage with possession the mortgagee is to enjoy the mortgaged property in lieu of interest for a period of five years and where he is deprived of his possession without payment of the principal he is entitled to interest even subsequent to the period of five years fixed for redemption and the same can be made chargeable on the mortgaged property: *A. I. R. 1921 Bom. 23, Dist ; 17 Mad. 469 and 46 Cal. 443, Rel. on.* [P 175 C 1]

C. A. Seshagiri Sastri—for Appellant.

K. V. Krishnaswami Ayyar—for Respondents.

Judgment.—Defendant 5 is the appellant and his appeal arises out of a suit brought by the deceased plaintiff, whose legal representative is the present respondent 1 for the recovery of a sum of money alleged to be due on a registered usufructuary mortgage bond dated 30th December 1912 and executed to the plaintiff by defendants 1 to 3 and by defendant 1 as the guardian of defendant 4 for Rs. 700. The mortgagee was to enjoy the mortgaged property in lieu of interest for a period of five years. Defendant 5 is a subsequent purchaser of the mortgaged property. The main point in dispute in the suit is one relating to the discharge of the suit mortgage debt. The original suit mortgage deed was not produced by the plaintiff but it has come to Court from the

custody of defendant 5. The plaintiff has set forth his version as to how defendant 5 came by this document, whereas defendant 5 has pleaded that this document was got back after discharging the mortgage debt. The mortgage bond, Ex. 1, purports to bear an endorsement of discharge signed by the plaintiff. In view of the facts disclosed in the pleadings, the trial Court, taking a correct view of the presumption of law in a case of this kind framed issue 1 in a proper way, so as to throw the incidence of the burden of proof upon the plaintiff. Issue 1 framed by that Court is, whether the suit mortgage deed remained undischarged.

On this question, both sides adduced oral and documentary evidence and after a full and careful view of the entire evidence and the probabilities, the trial Court came to the conclusion that the mortgage bond remained undischarged. On that footing it gave a decree in plaintiff's favour. The lower appellate Court also came to the same conclusion and confirmed the decree of the first Court. There being a concurrent finding on this question of fact by both the Courts, it is not possible to reject that finding, unless it is shown that it is vitiated by any of the flaws contemplated in S. 100, Civil P. C. The way in which the lower appellate Court has dealt with this question indicates to my mind that it has given due weight to the circumstances disclosed in the evidence which favour one side or the other; and after weighing the evidence and probabilities on both sides it has thought fit to believe the plaintiff's version as true and more probable. All that can be said in favour of defendant 5 in this case is, that he starts with an initial presumption in his favour. That is a rebuttable presumption and the question whether a presumption is rebutted or not is a question of fact to be determined according to the circumstances of each case. An attempt has been made by the learned advocate for the appellant to canvass the evidence adduced in this case, in order to show that the lower appellate Court was not quite correct in preferring one kind of evidence to the other. It is open to that Court to appreciate the evidence in the best manner according to its discretion, and where evidence has been properly admitted on both sides, even if

its conclusion on a question of fact is erroneous, it cannot be interfered with in second appeal. It is unnecessary for me to review the evidence as in a first appeal and come to a conclusion on this question of fact. I consider that the finding of both the Courts below on this question is entitled to acceptance and I accordingly confirm that finding.

One other point had been taken for the first time in this second appeal, and that relates to the award of interest to the plaintiff on the mortgage amount for the period subsequent to his dispossession. Somehow, defendant 5 failed to take an issue on this point and it does not appear that he took up this objection even in the appeal preferred by him against the decision of the first Court. No doubt, in para. 12 of his written statement he has taken the plea that no damages are payable by him to the plaintiff as claimed in the plaint. The Courts below have thought fit to award interest at 12 per cent for the subsequent period as a fair and reasonable rate of interest. The question is, whether under the terms of the mortgage deed, Ex. 1, interest is allowable to the plaintiff after the period of five years fixed for redemption. The deed recites that after the expiration of this period the principal amount of Rs. 700 should be paid to the plaintiff and the mortgage redeemed. If without the payment of the principal amount to the plaintiff, he is deprived of possession of the mortgaged properties, is he not entitled to reasonable interest by way of damages on grounds of equity? I take it that the lower Courts have allowed interest on equitable grounds. The rate fixed is not unduly high and there is no reason to reduce that rate. But the question is, whether the interest so awarded can be claimed along with the principal amount of the mortgage and made chargeable on the mortgaged property.

As to this, reliance is placed on the appellant's side on the decision in *Manikchand Manganchand v. Rangappa Kondappa* (1). In that case, the mortgage bond itself recites that after the stipulated period, the principal amount was to be recovered without interest by sale of the mortgaged property. In the mortgage deed in question in the present case,

(1) A.I.R. 1921 Bom. 28=59 I.O. 765=45 Bom. 523.

there is no such express provision negating the right of the mortgagee to interest after the period fixed in the deed. On the other hand, the decisions in *Linga Reddi v. Sama Rau* (2) and *Sita Nath Ghose v. Thakurdas Chakravarthy* (3), referred to by the learned advocate for respondent 1, show that interest is allowable in a case of this kind and it can be made also a charge on the mortgaged property. The observation in the Madras case is to the effect that, if the plaintiff was entitled to the usufruct of the mortgaged property in lieu of interest, it is permissible to award a reasonable rate of interest as damages which may be more or less equivalent to the usufruct of the land. The learned Judges further observed that such interest when allowed can be made a charge upon the property. The same view has been held in the Calcutta case also. I am therefore of opinion that there is nothing illegal in allowing interest to the plaintiff subsequent to the period of five years fixed in the mortgage bond and in the direction to make this interest also recoverable by the sale of the mortgaged property.

In the result, the second appeal fails and is dismissed with costs of respondent 1. In view of the undertaking given by the appellant when obtaining a stay order in C. M. P. No. 4498 of 1927, subsequent interest on the amount due under the mortgage-decree will be taken to be nine per cent per annum instead of six per cent from 5th January 1928.

P.R.S./P.N. *Appeal dismissed.*

(2) [1894] 17 Mad. 469=4 M.L.J. 143.

(3) [1919] 46 Cal. 448=52 I.C. 433.

A. I. R. 1932 Madras 175

RAMESAM, J.

C. R. Subramania Aiyar—Plaintiff—Appellant.

v.

Panchanada Odayar and another — Defendants—Respondents.

Second Appeal No. 388 of 1928, Decided on 9th April 1931, against decree of Sub-Judge, Tanjore, in A. S. No. 27 of 1927.

(a) Transfer of Property Act (1882), Ss. 58 (d) and 68 (c)—Mortgagor not delivering possession—Mortgagee is entitled to interest though he does not take steps to enforce possession.

In the case of a mortgage with possession if the mortgagor is guilty of the breach of the co-

venant to deliver possession, the mortgagee does not lose his right to interest merely because he does not take steps to enforce possession. He is entitled to fall back on the claim for interest whether it is described as interest or described as damages for breach of the covenant to deliver possession; 46 Cal. 448 and 17 Mad. 469, *Foll.*; 17 Bom. 425 and A. I. R. 1921 Bom. 28, *not Foll.* [P 176 C 2]

(b) Transfer of Property Act (1882), Ss. 58 (d) and 68 (c)—Mortgagor failing to deliver possession—Claim by mortgagee for damages is not barred so long as claim for principal is not barred—Limitation Act (1908), Art. 132.

In the case of a mortgage with possession if the mortgagor fails to deliver possession the mortgagee is deprived of his interest and the claim for damages in the shape of interest is not barred so long as the main claim for the principal is not barred; 19 All. 39 (P.C.) and 20 Mad. 371, *Appl.* [P 177 C 1, 2]

C. S. Venkatachariar and S. Ramaswami Ayyar—for Appellant.

C. A. Seshagiri Sastri—for Respondents.

Judgment.—The plaintiff is the appellant in this case. The suit is filed upon a mortgage bond, Ex. A, dated 31st August 1912. It was executed for Rs. 400, but the plaintiff admits that only Rs. 300 out of the consideration was advanced and the other Rs. 100 was not advanced to defendant 1. The mortgage purported to be a mortgage with possession of certain properties of defendant 1, but as a matter of fact possession of the properties was not delivered to the plaintiff. The plaintiff therefore claims damages in the shape of mesne profits for three years, which he claims to be Rs. 285 at the rate of Rs. 95 a year. Defendant 1 pleaded that the mortgage was not supported by consideration. Both the lower Courts found that it was supported by consideration to the extent of Rs. 300. Mr. Seshagiri Sastri, the learned advocate for the respondents, repeated the argument that the document was merely nominal and was not supported by consideration. He has not filed any cross-objections but has mentioned this point merely for supporting the decree so that I may not give the additional relief which the appellant seeks. However, I do not see any reason why I should not accept the finding of both the Courts below that the document is supported by consideration to the extent of Rs. 300. The Courts below disallowed the damages claimed, namely, Rs. 285 on the ground that the plaintiff's claim for possession of the properties is now barred and there-

fore the claim for mesne profits of these properties is also barred. The document fixed three years for payment of the principal, but as possession of the properties was not delivered, it is true that the plaintiff's cause of action for getting possession of the properties arose on the date of the document itself, namely, 31st August 1912. But Mr. Venkatachariar, the learned advocate for the appellant relies on Exs. B and B-1 as acknowledgments and he relies also on a case in *Anant Ram v. Inayat Ali Khan* (1).

The entries in Exs. B and B-1 are merely entries showing that defendant 1 received Rs. 293 towards the consideration of the mortgage document. It is difficult to say that these amount to acknowledgments of the liability to transfer possession of the mortgaged properties. In the case in *Anant Ram v. Inayat Ali Khan* (1), it was observed that acknowledgment of a right carries with it all its consequences. Very often it may be so; but even then it is difficult to infer by the acknowledgment of the mortgage document itself that the liability to deliver possession of the properties was intended to be also acknowledged. However I do not wish to express any final opinion on this matter as the case can be disposed of on other grounds. The right to damages is merely the right to get interest. Ex. A itself shows that the profits of the properties mortgaged and intended to be delivered were to be enjoyed by the plaintiff in lieu of interest. So the damages the plaintiff sustains by the non-delivery of possession are merely interest. In *Linga Reddi v. Sama Rau* (2), it was observed at p. 472, it is the same interest that is awarded as damages. That case is practically on all fours to this case with this difference, that the rate of interest was mentioned in the document of that case as 10 per cent, whereas it is not mentioned in the document before us, and here the plaintiff's claim is now confined only to damages for three years. The decision in *Sita Nath Ghose v. Thakurdas Chakravartthy* (3) also supports the appellant. That case resembles the present case much more than the case in *Linga Reddi v. Sama Rau* (2), because the rate of inter-

est was also not mentioned in the document there, 12 per cent was claimed as damages in that case, and the High Court observed that it was not excessive. As against these two decisions Mr. Seshagiri Sastri relies on two decisions of the Bombay High Court. One is *Mahadaji v. Joti* (4). In that case it was observed that the plaintiff was entitled to possession in lieu of interest and if he never troubles himself to obtain possession he lost his right to interest. That sentence by itself produces the impression that the defendant in that case was willing to give possession or offered to give possession to the plaintiff, but the plaintiff did not care to take it. But I do not find in the statement of facts anything to support the suggestion that the plaintiff was not willing to take possession. If the decision in that case rests on that fact it may be correct, i. e., that the mortgagee is not willing to take possession or does not want to take the trouble of taking possession and managing the properties though the mortgagor is willing to deliver them to him. It may be in such a case he is not entitled to interest, but if the mortgagor fails to deliver possession to the mortgagee in breach of the covenant in the document, in such a case, to say that the mortgagee loses his right to interest merely because the mortgagee has not taken any immediate steps to enforce possession, is not justified. This decision is followed in another decision of the same Court in *Manikchand Maganchand v. Rangappa Kondappa* (5). That decision practically presents to me the same difficulty as the earlier decision.

Where a mortgagor is guilty of the breach of the covenant to deliver possession, the mortgagee is entitled to fall back on the claim for interest, whether it is described as interest or described as damages for breach of the covenant to deliver possession, but to say that it is the business of the mortgagee to get into possession and if he does not get possession he is not entitled to interest or damages at all does not commend itself to me. A proposition of that kind gives a premium to the mortgagors to commit breaches of the covenant into which they have entered. It is observed by the Chief Justice in this case:

(1) [1920] 2 L. L. J. 549.

(2) [1894] 17 Mad. 469=4 M. L. J. 143.

(3) [1919] 46 Cal. 448=52 I. C. 433.

(4) [1893] 17 Bom. 425.

(5) A. I. R. 1921 Bom. 23=59 I. C. 765=45 Bom. 523.

"It would be a very bad precedent if we hold that a usufructuary mortgagee could lie by and not take the trouble to get into possession, relying upon his being able afterwards to make a claim before the Court for damages for not having been given possession."

If it is meant that a mortgagee who is not willing to take possession even if the mortgagor is willing to offer possession is not entitled to sympathy. I agree. But if more is meant by the sentence quoted that even where a mortgagor refuses to deliver or does not deliver possession the mortgagee should lose interest because he has not immediately taken steps to get into possession is to make a person who breaks his contract not liable for the consequences of the breach, and I do not agree with it. The two Bombay decisions are in my opinion inconsistent with the decisions in *Linga Reddi v. Shama Rau* (2) and *Sita Nath Ghouse v. Thakurdas Chakravarthy* (3) and I prefer to follow the decision of this Court and of the Calcutta High Court. I see that my brother Sundaram Chetty, J. is also taking the same view in his decision in *Gurusami Thevan v. Ganapathi Chetty* (6). He has also tried to distinguish the case in *Manikchand Manganchand v. Rangappa Kondappa* (5) by an observation that in that case, the amount was to be recovered without interest according to the terms of the mortgage bond. This is not the ground upon which the learned Judges base their decision, and I prefer to express my disagreement of the decision rather than distinguish it in this way.

Mr. Seshagiri Sastri also contended that a claim for damages cannot be maintained after six years of the breach and he referred to cases of leases and sales. We have nothing to do with these cases. In the case of a mortgagee, if there is a breach of a covenant, a claim for damages remains unbarred so long as the claim for the principal is also unbarred. This is the principle stated by the Privy Council in *Mathura Das v. Rajah Narindar Bahadur* (7). That is a case where there is no provision for payment of interest after the due date. It is given as damages by the Privy Council and they held that it is not barred. This was followed by this Court in *Nityananda Patnayudu v. Sri Radha Chairana Deo* (8). I think the principle of those cases applies. By

failure to deliver possession of the property the plaintiff is deprived of his interest, and the claim for such damages for failure in the shape of interest cannot be barred so long as the main claim is not barred. In this case however the plaintiff confined it to damages for three years only prior to suit. He is not entitled to get larger or very exorbitant rate of interest under the guise of a claim for mesne profits, especially as he did not care even to have the rate of interest mentioned in the mortgage bond as in the case of *Sita Nath Ghouse v. Thakurdas Chakravarthy* (3). I think the interests of justice will be best served by giving interest at 12 per cent on the principal sum of Rs. 300 in addition to the sum decreed by the lower Court. The plaintiff will be entitled also to get interest at 6 per cent from the date of the decree up to the date of payment. The plaintiff will be entitled to a decree at 12 per cent on the sum of Rs. 300 from 27th February 1922 to 6th September 1926, the date of the District Munsif's decree, and on the aggregate amount at 6 per cent. It is admitted that Rs. 300 already decreed by the Courts below has been paid, so that the further interest at 6 per cent will be calculated only on the amount of interest, i. e., Rs. 162 with interest at 6 per cent from the date of the District Munsif's decree. Each party will bear his own costs throughout except in the memorandum of objections filed in the lower appellate Court as to which the order of the lower appellate Court will stand.

P.R.S./P.N. *Order accordingly.*

A. I. R. 1932 Madras 177

VENKATASUBBA RAO AND CURGEN-
VEN, JJ.

(*Nandula*) Jagannadham—Appellant.
v.

(*Goteti*) Vighneswarudu (*dead*) and
others—Respondents.

Appeal No. 181 of 1926, Decided on
24th July 1931, against decree of Sub-
Judge, Narsapur, in Original Suit No. 113
of 1922.

(a) **Hindu Law—Widow has absolute power of disposal over income of property inherited by her—It is not incumbent on her to apply income to payment of debt binding on her.**

A widow or other limited heir has absolute power of disposal over the income of the property inherited by her. She is not bound to make any savings and may spend the whole income just as she likes. The principle holds good even where there are debts which she is bound to pay. She

(6) A. I. R. 1932 Mad. 173.

(7) [1897] 19 All. 39=23 I. A. 138=7 Sar. 88
(P. C.).

(8) [1897] 20 Mad. 371.

is no doubt bound to pay the interest on the debt where there is a sufficient surplus but it is not incumbent on her to apply any part of the income to the payment of the corpus. 18 *Mad.* 113; 18 *I. C.* 953 and *A. I. R.* 1932 *Mad.* 97, *Rel. on.*, 11 *M. I. A.* 619 (*P. C.*) and 2 *I. A.* 7 (*P. C.*), *Dist.* [P 178 C 2]

(b) **Hindu Law—Widow—Sale by widow—Portion of consideration not taken for legal necessity bearing very small proportion to entire consideration — Sale can be upheld in its entirety.**

Where in the case of a sale made by the widow it is found that the portion of the price not taken for legal necessity bears such a small proportion to the entire consideration that it might be left out of account, the sale can be upheld in its entirety: *A. I. R.* 1927 *P. C.* 37 and *A. I. R.* 1927 *P. C.* 244, *Foll.* [P 180 C 1]

G. Lakshmanan for *A. Satyanarayana*—for Appellant.

Ch. Raghava Rao for *B. T. M. Raghavachari*—for Respondents.

Judgment.—In this appeal we have to decide, whether a certain alienation made by a Hindu widow is binding on the reversioner. One Manikya Rao died on 4th January 1919 leaving defendant 1, then a minor, his widow. On 26th September 1920, her father defendant 2, agreed on her behalf, to sell the suit house to defendant 3 for Rs. 3, 200. This agreement was made subject to the widow's confirmation on her attaining majority. After she became a major, in pursuance of that contract she executed on 16th February 1922 a conveyance of the property in favour of defendant 3. The price mentioned in the sale deed is Rs. 3,770-5-0, which, ignoring a certain small item, represents the sum mentioned in the contract, (namely Rs. 3,200) together with the interest thereon to the date of the sale. The fact was, that the vendee was put in possession of the property on the date of the agreement and he was on that account required, in lieu of the profits received by him, to pay interest on the amount originally fixed as the price. For deciding the question raised, the price must therefore be taken to have been Rs. 3,200.

The lower Court has set aside the sale, but has declared in favour of defendant 3 a charge over the property in question for Rs. 3,200, the price paid. From this decree he appeals. His case was that the sale was made for the purposes of necessity. Rs. 3,000 out of the consideration went in full discharge of a mortgage of 1916 and the balance of Rs. 200 in part payment of another mortgage of 1918. Both these mortgages were those executed by defendant 1's husband, and that the

debts were accordingly binding on the inheritance is not disputed. The plaintiff attacks the sale by saying that the debts could have been paid off with the income from the estate. He contends that the rents for 1918, which accrued due during Manikya Rao's lifetime must have been received subsequent to his death. It is unnecessary to decide whether his contention is correct, that a Hindu widow has no absolute power of disposal over the income which accrues due during her husband's lifetime. For it has not been shown that in point of fact such income was available to defendant 1. The learned Judge does not find that she was in possession of the income for 1918. He merely observes that she must have been in possession of such income. Nor is it sufficient to suggest that she received the rents; what must be shown is, that after allowing for the expenses of the previous year, there was a balance left in her hands, available for the payment of the debts. On the contrary, it appears clearly that Manikya Rao was borrowing money for household expenses even some time prior to his death. It is likely that for the expenses incurred during his lifetime, the widow had to make payments. We are not therefore prepared to assume that she had at her disposal any unexpended rents of the year 1918 and was thus in a position to pay off any part of the debts with such rents.

It is next contended, that by the date of the sale, the widow came into possession of some considerable income and that it being incumbent upon her to pay off her husband's debts with such income, she was not competent to sell any part of the estate. The question raised is whether a Hindu widow is bound to pay the debts of her husband out of the income. It is settled law, that a widow or other limited heir has absolute power of disposal over the income of the property inherited by her. She was not bound to make any savings and may spend the whole income just as she likes. But it is argued for the respondent, that this rule is subject to the qualification, namely, the legal necessity which alone justifies an alienation disappears when the limited owner is shown to be in possession of a sufficient surplus, after meeting the necessary expenses. This proposition involves that where there are binding debts to pay the so-called absolute power over the in-

come becomes illusory. The contention is not only illogical, but it is opposed to authority. The following passage from the judgment of Muthuswami Iyer, J., in *Ramaswami v. Mangaikarasu* (1) states the law very tersely:

"It is next contended that she was bound to apply the income of her husband's estate first in discharge of his debts instead of executing the mortgage. The net income is, under Hindu law as administered in this Presidency, her own exclusive property as widow and she is not bound either to save or apply it for the benefit of the reversioners. She is no doubt bound to pay her husband's debts from it, because she had taken charge of the whole property left by him whilst her right of inheritance extends only to the property as diminished or affected by his debts. As between her and the reversioners she is entitled to say, I will pay my husband's debts by the sale of the property and take the residue, and I desire to keep the net income derived from it and to spend or invest it as I please."

The point is more fully dealt with in *Jagayya v. Goli Appala Raju* (2). That case points out that it is not over the gross but net income that a widow has absolute power of disposal. She takes the estate subject to payment of debts. The interest on those debts is an expense properly debitable to the income. A limited owner is thus bound to pay off the interest on the debt where there is a sufficient surplus, but it is equally clear that it is not incumbent on her to apply any part of the income to the payment of the corpus. So stated, the rule is consistent and logical, and we must therefore reject the view of the lower Court, which is opposed both to reason and authority. The last mentioned case was followed in *Thiruvengadam Pillai v. Gnanasambandam Pillai* (3), to which one of us was a party.

The cases relied on by the respondent's counsel, such as *Kavali Venkatanarayanappa v. The Collector of Masulipatam* (4) and *Mahomed Shumsool v. Sheukram* (5), are not really helpful. The point to decide is whether a limited owner is bound to apply the surplus revenues to the payment of binding debts. Apart from the point not having been considered or decided in these cases, there are not even dicta in them on which the respondent can rely. From a bare reference to the surplus revenue in the statement of facts, no inference can be drawn either for or

against the position taken up by the respondent. As regards the cases referred to in the lower Court's judgment, they scarcely merit any consideration, as they are irrelevant and have no bearing on the question. To the authorities that actually decide the point, the learned Judge has failed to refer.

The sale is next attacked on the ground that it was made for an inadequate price. The learned Judge has rightly attached no weight to the evidence on the plaintiff's side, but he makes a conjecture that the house might have been worth Rupees 5,000 on the date of the sale. He records a halting finding to this effect. It is contended by the respondent that the late owner spent nearly Rs. 7,000 on the construction of the house. This has not been satisfactorily proved. Apart from that, a house cannot be expected to fetch at a sale the amount which its owner spends in building it to suit his own fancy or needs. According to the learned Judge, there is no reason to suspect collusion on the part of the widow or her father with the purchaser. In the circumstances we fail to see why, in the absence of evidence to that effect, it should be held that the price got was inadequate.

The sale is next impeached on the ground that it has not been shown that there were circumstances of actual pressure. According to this contention, where money is raised for paying off a binding debt, an alienation can be justified only if actual pressure is shown in the sense of some pressure from without. For instance, it must be shown that legal proceedings were threatened or a forced sale of the mortgaged property was imminent. In our opinion, this is not the correct test of justifying necessity for a restraint of this kind, far from benefiting or preserving the estate, would lead to the very opposite result. Why should a widow, for instance, be compelled to allow a mortgage debt to grow and swallow up the property mortgaged, when the early paying off of that debt would be beneficial to the estate and tend to its preservation? If the alienation was made in the exercise of reasonable discretion and could be justified as the act of a prudent manager, the objection that there was no compulsion from without and that the necessity was not imminent, should not be allowed to prevail. The question then reduces itself to this. The purpose of the

(1) [1895] 18 Mad. 113.

(2) [1913] 18 I. C. 953.

(3) A. I. R. 1932 Mad. 97.

(4) [1868] 11 M. I. A. 619=10 W. R. 47 (P.C.).

(5) [1874] 2 I. A. 7=14 B. L. R. 226=22 W. R. 409 (P.C.).

sale being the payment of a binding debt, was effected in good faith and in the exercise of proper discretion; in other words, could it be justified as the act of a prudent manager. Judged by this test we are satisfied that this sale must be upheld. The husband died in debt. There were two mortgages outstanding. Some part of the debt had been incurred for building this very house. He died while still it was being built. To complete its construction it would be necessary for the widow to raise further money. We fail to see why, in such circumstances, any limited owner should be compelled to retain against her consent such a property, while she deems it prudent in the exercise of a sound discretion to dispose of it and pay off a binding debt.

There is one further matter to be dealt with. The sale price was Rs. 3,200, out of which only Rs. 2,550 was applied in payment of the corpus or the principal of the debts. The balance of Rs. 650 went in discharge of the interest due on those debts. According to our judgment the widow was bound to pay the interest from the surplus revenue in her hands. In these circumstances is the sale to be upheld in its entirety or not? Following *Sree Krishnadas v. Nattu Ram* (6) and *Suraj Bhan Singh v. Sah Chain Sukh* (7) we hold that the portion of the price not taken for legal necessity bears such a small ratio to the entire consideration that it might be left out of account. Accordingly the sale is upheld and the appeal is allowed and the suit is dismissed with costs of defendant 3 throughout. In this view it is unnecessary to decide the question whether the plaintiffs are the next reversioners of Manikya Rao or not.

P.R.S./P.N. — Appeal allowed.

(6) A. I. R. 1927 P. C. 37=100 I. C. 130=54 I. A. 79=49 All. 149 (P. C.).

(7) A. I. R. 1927 P. C. 244=105 I. C. 257.

* * A. I. R. 1932 Madras 180

CURGENVEN, J.

N. Govindarajulu Nayudu—Petitioner.

v.

Imperial Bank of India, Vellore—Respondent.

Civil Misc. Petn. No. 3962 of 1931, Decided on 20th October 1931, against decree of Sub-Judge, Vellore, D/- 14th July 1931, in A. A. O. No. 283 of 1931.

* * Civil P. C. (1908), O. 39, Rr. 1 and 2 and S. 151—If injunction cannot be issued under O. 39 it cannot be issued under S. 151

—But High Courts have power to issue injunction in proper cases independent of Civil P. C.—Execution of and appeal against ex parte decree simultaneously proceeding—Execution can be restrained by injunction to decree-holder.

If an injunction cannot be passed under the provisions of O. 39, R. 1 or R. 2 it is not permissible to seek the power under S. 151 of the Code in order to justify such an order. But the High Courts, over and above the powers which they enjoy under that Code, possess an equitable jurisdiction derived from the old Supreme Court to issue an injunction in appropriate cases. There is nothing either in S. 151 or any other provisions of the Code which would deprive chartered High Courts of powers derived independently of it. The High Court is not bound by the terms of the Code in issuing injunctions in appropriate cases. Where two proceedings are going on at the same time, one the execution of the ex parte decree and the other an appeal against it which is a proceeding which may eventuate in the decree being set aside, it is quite clear that these two proceedings if allowed to go on independently, may lead to incompatible and perhaps unfortunate consequences. Therefore in such cases in general there is justification for a Court exercising the power to restrain the holder of the decree against which such proceedings are pending from exercising it. (*Case law discussed.*)

[P 181 C 1, 2]

V. C. Gopalaratnam—for Petitioner.

T. D. Srinivasachariar and C. Vaidyanatha Rao—for Respondent.

Order.—This application was filed for the stay of further proceedings in pursuance of an ex parte decree passed in O. S. No. 84 of 1930 on the file of the Sub-Court of Vellore pending disposal of an appeal against an order refusing to set that ex parte decree aside. When the stay application came up for the issue of ex parte orders, I understand that it was held by the learned Judge who disposed of it, following *Bhagwat Rajkoer v. Sheo Golam Sahu* (1) and some cases of this Court, that this Court has no power in proceedings of this nature to stay execution of a decree under O. 41, R. 5. Accordingly the application was converted into one for an injunction to restrain the respondent from executing the decree, and the question has been raised before me whether an application of this kind will lie. So far as a Court which is restricted to the terms of the Code of Civil Procedure is concerned, it has been held by Phillips, J., in *Varadacharyulu v. Narasimhacharyulu* (2), which I had occasion to follow in *Ayyaperumal Nadar v. Muthuswami Pillai* (3), that if an injunc-

(1) [1904] 31 Cal. 1081=9 C.W.N. 123.

(2) A. I. R. 1926 Mad. 268=92 I.C. 680.

(3) A. I. R. 1927 Mad. 687=102 I. C. 700.

tion cannot be passed under the provisions of O. 39, R. 1 or R. 2, it is not permissible to seek the power under S. 151 of the Code in order to justify such an order. It has however been argued now that a High Court is not restricted to the terms of the Code, but possesses an equitable power, otherwise derived, to control the proceedings in other Courts. There can be no doubt that in England a power of this character exists and a discussion of the nature of it will be found in *Ellerman Lines Ltd. v. Read* (4). In that case the question arose as to whether a British subject could be restrained from enforcing a foreign judgment, in execution, and the Court of appeal answered the question in the affirmative, the principle upon which the matter was decided being clearly explained in the judgment of Atkin, L.J., namely, that the Court in granting injunctions does not seek to assume jurisdiction over the foreign Court or arrogate to itself some superiority which entitles it to dictate to the foreign Court, or that it seeks to criticize the foreign Court or its procedure:

"The English Court has regard to the personal attitude of the person who has obtained the foreign judgment. If the English Court finds that a person subject to its jurisdiction has committed a breach of covenant, or has acted in breach of some fiduciary duty or has in any way violated the principles of equity and conscience, and that it would be inequitable on his part to seek to enforce a judgment obtained in breach of such obligations, it will restrain him, not by issuing an edict to the foreign Court, but by saying that he is in conscience bound not to enforce that judgment."

I do not propose to go so far as the learned Judges who decided *Ganga Singh v. Pirthichand Lal* (5), and who appear to have based their decision as to the power of a Court (not necessarily a High Court) to issue an injunction in certain circumstances purely upon English precedents and without any reference to the terms of the Code of Civil Procedure. But there is authority for the view that the High Courts, over and above the powers which they enjoy under that Code, possess an equitable jurisdiction derived from the old Supreme Court to issue an injunction in appropriate cases. This is the basis of the decision in *Periakaruppan*

Chettiar v. Ramaswami Chettiar (6) where Ramesam and Devadoss, JJ. held that the Chartered High Courts have such a power following *Rash Behary Dey v. Bhowani Churn Bhose* (7) and *Mungle Chand v. Gopal Ram* (8). In the former of these two decisions Woodroffe, J., who certainly is a high authority on questions of procedure, gave it as his opinion that a High Court had and has, independently of the Civil Procedure Code, power to make an order of the nature sought, and he answered in the negative the question whether there was anything in the Civil Procedure Code which took away that power. That case was decided under the old Code, but I do not think that there is anything either in S. 151 or any other provision of the new Code which would deprive a High Court of powers derived independently of it. Another case *Singaravelu Mudali v. Balasubramania Mudali* (9), decided by Ramesam, J., has been cited to me as an authority in favour of the existence of the power, but I observe that he was able to bring the injunction within the terms of R. 2, O. 39, so that the remaining observations in the learned Judge's judgment are, I think, merely obiter, though, as I understand them, he was of opinion that a power exists apart from the terms of that rule. It appears to me however that *Periakaruppan Chettiar v. Ramaswami Chettiar* (6), is sufficient authority for the general proposition that this Court is not bound by the terms of the Code in issuing injunctions in appropriate cases. It appears to me that a case of the present description is eminently appropriate for the exercise of such a power. We have two proceedings going on at the same time, one the execution of the decree and the other a proceeding which may eventuate in the decree being set aside. It is quite clear that these two proceedings, if allowed to go on independently, may lead to incompatible and perhaps unfortunate consequences. I think accordingly that, in general, there is justification for a Court exercising the power to restrain the holder of the decree against which such proceedings are pending from exercising it.

On the merits I have perused the order of the learned Subordinate Judge refusing

(4) [1928] 2 K. B. 144=97 L. J. K. B. 366=138 L. T. 625=44 T. L. R. 285=33 Com. Cas. 219=17 Asp. M. C. 421=30 L. R. 77.

(5) A. I. R. 1922 Pat. 34=69 I. C. 891=1 Pat. 356.

(6) A. I. R. 1928 Mad. 491=109 I. C. 281.

(7) [1907] 34 Cal. 97.

(8) [1907] 34 Cal. 101.

(9) A. I. R. 1926 Mad. 1126=97 I. C. 938.

to set aside the decree and it appears to me, without in any way expressing any definite opinion, that the appeal has some prospects of success. The decree is a large one for a sum of Rs. 12,000 and it is admitted that about Rs. 9,000 has been paid. The petitioner admits that he asks for a stay not because he distrusts the stability of the decree-holder but because he finds difficulty under the existing economic conditions in raising the balance. I think in the circumstances that there are sufficient grounds for granting his request on the basis of his furnishing security and I accordingly order that an injunction do issue to the decree-holder not to execute the decree until the disposal of the Civil Miscellaneous Appeal provided that the judgment-debtor gives security within six weeks from the date of the receipt of this order to the satisfaction of the Subordinate Judge of North Arcot for the outstanding amount of the decree and that he further undertakes to pay interest at the rate of 8 per cent, in the event of the money being found due, for the period during which the injunction is in force. Failing compliance with these directions the injunction will terminate and the petition will stand dismissed with costs.

P.R.S./B.V. *Order accordingly.*

*** A. I. R. 1932 Madras 182**

RAMESAM, OFFG. C. J. AND CORNISH, J.
Peruri Appalaraju—Plaintiff—Appellant.

v.

Peruri Krishnamurthy and others—Defendants—Respondents.

Appeal No. 241 of 1930, Decided on 19th August 1931, against decree of Sub-Judge, Cocanada, D/- 17th February 1930, in O. S. No. 1 of 1928.

*** Transfer of Property Act (1882), S. 53—Fraudulent transfers can be proved by circumstantial evidence from which fraud may be inferred—Where consideration is adequate one creditor may be preferred to all others and whole transfer is valid—Where only part of debt due to preferred creditor is real and rest fictitious, whole transfer is void.**

Where it is alleged that a sale of property is effected for an inadequate consideration only to defraud the decree-holder creditor of the judgment-debtor vendor, the only evidence that can be available is the various suspicious circumstances from which an inference can be drawn that the sale was made with a view to defraud the decree-holder creditor.

A sale in favour of a creditor by which he is preferred but by which another creditor loses his money is valid only where there is no inadequacy

of consideration. But that principle does not apply to a case where the whole of the consideration of the transaction is not the debt of the preferred creditor. Where only a part of the consideration is a debt due to the creditor, but the rest of it is fictitious or there is inadequacy, then the whole transaction is void: *A. I. R. 1924 Mad. 450*; *36 Mad. 29* and *29 I. C. 690, Dist.*; *30 Mad. 6* and *A. I. R. 1914 P. C. 137, Rel. on.*; *A. I. R. 1915 P. C. 115*; *A. I. R. 1916 P. C. 238*; *18 I. C. 768*; *A. I. R. 1927 Mad. 278*; *A. I. R. 1928 Mad. 20* and (1930) *M. W. N. 1145, Ref.*

[P 184 C 1]

Ch. Raghava Rao and K. Bhimasankaram—for Appellant.

P. Somasundaram and G. Balaparameswara Rao—for Respondents.

Judgment.—The plaintiff is the appellant before us. The facts out of which this appeal arises may be stated as follows: Defendant 1 is the natural son of the plaintiff, but adopted by his cousin. Defendant 1 obtained a decree on an unregistered mortgage bond which therefore operated as a mere money bond for a sum of Rs. 1,600 which now amounts to Rs. 3,000 in O. S. No. 141 of 1923. He applied for attachment of certain properties of defendants 2, 3 and 4 situated at Thetagunta. The attachment was ordered on 21st September 1927. But on 20th September, the preceding day, the properties whose attachment was sought were sold by Ex. A to the plaintiff for Rs. 9,000. The consideration for the sale deed consisted of (1) a sum of Rs. 4,931-1-9 due to the vendee on two mortgage documents dated 13th March 1922 and 8th December 1923, Exs. D and E-1; (2) Rs. 103-3-4 due on a promissory note to the vendee; (3) Rs. 3,800 intended for discharging (a) the debt due to the Rani of Tuni under a mortgage dated 5th March 1913, Ex. G, and (b) the debt due to China Talrazu and others under a mortgage deed dated 8th December 1923, and also (c) a decree debt due to one Malrazu Ramaswami who has also obtained attachments of some property in execution of the decree; lastly (4) Rs. 165-10-11 paid before the Registrar. There is no dispute about the genuineness of items 1 and 2.

As to item 3, the vendee as a matter of fact paid Rs. 4,387-4-0, that is, much more than Rs. 3,800 mentioned in the document. When the attachment sought by defendant 1 was effected a claim petition was filed by the vendee relying on the sale deed. This claim was inquired into by the District Munsif of Cocanada and it was dismissed: vide order, Ex. J. He

held that the sale deed, Ex. A, was executed with the secret reservation of some interest in the lands to the judgment-debtors and therefore it is not *prima facie* a bona fide transaction. Hence this regular suit by the plaintiff. The Subordinate Judge of Cocanada who tried the suit dismissed the suit. The plaintiff files this appeal.

It may be observed that the real crux of the case lies in the question whether the sale deed, Ex. A, was for adequate consideration. Defendant 1 alleges that the property is worth Rs. 12,000, and there was actually an offer for that amount. But finally it was arranged between the plaintiff and the vendors to have a sale deed for Rs. 9,000 only, there being some kind of secret arrangement in favour of the debtors so that they may get the benefit of the difference between the full value and the value mentioned in the sale deed. The evidence on this matter consists of two transactions. One is an attempt to purchase by a retired Tahsildar, P. W. 2, Pandayala Gurumurthi. He says he was willing to purchase three-fourths of the lands for Rs. 7,500. His agent Atti China Venkatachalam gives evidence as D. W. 2. He says he settled the sale for Rs. 8,000. The discrepancy is only apparent because even P. W. 2 admits that D. W. 2 wrote to him recommending that the lands may be taken for Rs. 8,000. But the transaction fell through. P. W. 2 says that the whole extent of the land is 20 acres wet and 22 acres dry. This portion of his evidence seems to be inaccurate, because we have got evidence in connexion with the second transaction, now to be referred to, that the extent of lands is 120 acres. The other transaction which is relied on in this case is that one Dantuluri Venkatanarasimharazu, D. W. 3, arranged for a purchase of these lands for Rs. 12,000. A stamped agreement was actually drafted, which is Ex. 1 in the case, but was not executed by the mother of defendants 2 and 3. This document shows that the lands in Thetagunta are 120 acres in extent. It is suggested that this Ex. 1 is really a fabrication to support defendant 1's case. We are unable to accept this suggestion. D. W. 3 is a Kshatriya gentleman getting an annual income of Rs. 4,000 from his lands and he is a Taluk Board member. He was private secretary to the Rani of Tuni, though it is just possible that he is not occupying that

position because the Rani has adopted a son. We do not see any reason why this gentleman should lend himself to a fabrication of the document for helping this dispute between the plaintiff and defendant 1 who are Vysias in connexion with the debts due from defendants 2 and 3 who are Kapus. No prior enmity or partiality has been elicited in cross-examination of this witness, and we find it difficult to brush aside the transaction proved by this gentleman. Apart from this there are other suspicious circumstances in the case. Whereas Ex. 1 mentions all the debts of defendants 2 and 3, only defendant 1's debt is omitted from Ex. A, and arrangements are made for the payment of all other debts. It is true there is another debt due to one Soma Razu, but that has been realized by sale of the house of defendants 2 and 3. There was also another mortgage debt due to defendant 1, but that has been realized by the sale of Kathipudi lands. While defendants 2 and 3 have no other property, only defendant 1's debt has been left unprovided for at the time of the execution of Ex. A. The decree obtained by defendant 1 was itself the subject-matter of second appeal and Letters Patent Appeal, and we disposed of the Letters Patent Appeal yesterday. It is practically proved from the records in the case and from the evidence that the plaintiff was financing that appeal, and though it may be said that the plaintiff has an interest in getting rid of the debt of defendant 1 for the protection of his sale deed, still the fact that he was incurring expenses in addition to the consideration mentioned in the sale deed is significant.

The mother of defendants 2 and 3 gives evidence in the case as P. W. 4. She says she did not attend Court on prior occasions. She was brought to Court by the plaintiff on the occasions when she gave evidence and it is even suggested to her that the plaintiff was providing for her maintenance. Taking these circumstances into consideration and having regard to the evidence of D. W. 3, we must hold that it was proved that at the time of the sale deed the lands were considered to be worth Rs. 12,000 and that the sale for Rs. 9,000 was really made with the view of defrauding and defeating the debt of defendant 1 by screening the property under the guise of a sale deed for inadequate consideration. In all such cases

the only evidence that can be available is the various suspicious circumstances from which an inference can be drawn that the sale was made with a view to defraud defendant 1. It is true that a bare suspicion will not do, but we think more than that is available in this case. We therefore agree with the finding of the Subordinate Judge.

The next question is whether the sale is wholly void. Apart from the fact that part of the consideration consists of four mortgage deeds we think there is no other circumstance that can be invoked in favour of the plaintiff. It is true in *Musaharsahu v. Hakim Lal* (1) and *Mina Kumari Bibi v. Bijoy Singh Dudhuria* (2) the Privy Council held that a sale in favour of a creditor, by which he was preferred and another creditor lost his money, is valid. But that is a case where there is no inadequacy of consideration. The whole amount of the consideration was in discharge of a debt due to the vendee creditor. In such cases it is often observed that a debtor may prefer one creditor to another. But that principle does not apply to a case where the whole of the consideration of the transaction was not the debt of the preferred creditor. Where only a part of the consideration is a debt due to the creditor, but the rest of it is fictitious or there is inadequacy, then the whole transaction is void. This is the decision in *Chidambaram Chettiar v. Sami Aiyar* (3), affirmed by the Privy Council in *Chidambaram Chettiar v. Srinivasa Sastrigal* (4).

Mr. Raghava Rao, the learned advocate for the appellant, has invited our attention to three cases. One is the judgment of our brothers Venkatasubba Rao and Phillips, JJ., in *Loorthia Odayar v. Gopalasami* (5). In that case the transaction attacked was a mortgage. The mortgage was partly for paying prior creditors to the extent of Rs. 7,000 and partly for Rs. 3,000 which has been found to be fictitious. The learned Judge Venkatasubba Rao, relying on the decisions in *Musaharsahu v. Hakim Lal* (1) and *Mina Kumari v. Bijoy Singh* (2), upholds

the transaction to the extent of Rs. 7,000. He distinguishes the decision in *Chidambaram Chettiar v. Sami Aiyar* (3) by saying it is not a case dealing with immovable property, but even where the alienation is not of immovable property the principles applicable are the same as S. 53 by analogy. We are not satisfied with the reasons given by the learned Judge for distinguishing *Chidambaram Chettiar v. Sami Aiyar* (3). The two decisions of their Lordships of the Privy Council in *Musaharsahu v. Hakim Lal* (1) and *Mina Kumari v. Bijoy Singh* (2), are cases where there is no inadequacy of a consideration and do not, in our opinion, support the conclusion of the learned Judge. On the other hand a number of cases of this Court seem to take the view in *Chidambaram Chettiar v. Sami Aiyar* (3); for example, *Sama Row v. Doraiswami Chettiar* (6), *Viswantha Reddi v. Raja Venkatesa Reddi* (7), *Rajabhadar Mudaliar v. Thiruvengada Mudaliar* (8) and *Ponnuswami Pillai v. Quadir Moihideen Rowther* (9). In the last of these cases it is observed by our brothers Kumaraswami and Reilly, JJ., that the trend of the authority is in favour of holding the whole transaction void. If the consideration is adequate, but if it is attacked only on the ground that a creditor is preferred, then the whole transaction is valid. This is all the effect of the Privy Council decisions. The other cases are *China Pitchiah, In re* (10) and *Krishna Kumar Nandy v. Joy Krishna Nandy* (11). Both these cases are cases of mortgage, but the first of these is easily distinguishable. In that case the mortgage was executed partly for a debt primarily owing to the mortgagee and to that extent was held valid on the ground that S. 53 does not apply to a case where a creditor is preferred.

This distinction does not apply to the decision in *Loorthia v. Gopalaswami* (5). In the other case it was found that there was no other creditor to be defrauded. The decision rests also on other grounds and need not be discussed any further. We therefore think that prima facie the transaction is void. But there is the fact that the plaintiff had paid off

(1) A. I. R. 1915 P. C. 115=32 I. C. 343=43 I. A. 104=43 Cal. 521 (P.C.).

(2) A. I. R. 1916 P. C. 238=40 I. C. 242=44 I. A. 72=44 Cal. 662 (P.C.).

(3) [1907] 30 Mad. 6=16 M. L. J. 427=1 M. L. T. 351.

(4) A. I. R. 1914 P. C. 137=23 I. C. 714=37 Mad. 227 (P.C.).

(5) A. I. R. 1924 Mad. 450=80 I. C. 147.

(6) [1913] 18 I. C. 768.

(7) A. I. R. 1927 Mad. 278=99 I. C. 709.

(8) A. I. R. 1928 Mad. 20=106 I. C. 651.

(9) [1930] M. W. N. 1145.

(10) [1913] 36 Mad. 29=11 I. C. 868.

(11) [1915] 29 I. C. 690.

four prior mortgages. Two of the mortgages are in favour of himself. If the sale is not valid the mortgages will stand. Even in the case of other mortgage debts there is no reason to think that he intended to extinguish them. The presumption of S. 100 that he intended to keep them alive holds. The result is that he holds the position of a mortgagee under those four documents and defendant 1 will be entitled to sell the property subject to the right of the plaintiff on those four mortgages. In estimating the value of these mortgages it must be remembered that he was in possession of the lands and was enjoying the mesne profits. Perhaps it may be proper to set off the mesne profits towards interest. Subject to the claim as such mortgagees, so understood, defendant 1 will be at liberty to sell the suit lands. Instead of dismissing the suit we will substitute a declaration to that effect. But as the plaintiff has substantially failed the appeal is dismissed with costs. If in the execution of the sale by defendant 1 more amount is realized than is necessary to discharge his debt, the surplus will go to the plaintiff; for we have no intention of questioning the sale deed except in so far as it delays or defeats defendant 1.

P.R.S./B.V.

*Appeal dismissed.***A. I. R. 1932 Madras 185**

CURGENVEN, J.

Sethurama Ayyar—Appellant.

v.

T. B. Varadaraja Ayyar—Respondent.

Appeal No. 27 of 1930, Decided on 15th October 1931, against order of Small Cause Court Judge, Kumbakonam, D/- 18th March 1929, in A. S. No. 80 of 1928.

(a) **Hindu Law—Widow—Decree against—Decree-holder can proceed during her lifetime—Purchaser from her holds it subject to same risk.**

During lifetime of a limited owner, e. g., a Hindu widow, against whom a decree has been passed the decree-holder can proceed against her interest in the property, and so long she lives a purchaser from her holds it subject to this risk.

[P 186 C 1]

(b) **Civil P. C. (1908), O. 7, R. 5—Suit against limited owner on simple money debt—No issue raised as to whether it was binding on estate—Whether decree-holder in execution of such decree can show that in fact it was binding on estate depends on view taken by Court of frame of suit—Plaintiff should so frame his suit as to show clearly that he asks for decree against whole estate.**

Where a suit is filed against the limited owner only as a simple money claim upon a debt

and no issue is raised as to whether the debt is binding on the estate, then the answer to the question whether a decree-holder can show in execution of such a decree that the debt is in fact binding, so that he may bring on a purchaser from the limited owner as representative of the reversionary interest and proceed against the property in his hands, depends upon the view which the Court takes of the frame of the suit whether it may be construed as aimed at the whole estate by virtue of the binding character of the debt or whether the plaintiffs did not look beyond the interest of the limited owner. In such suits it is incumbent upon the plaintiffs so to frame his suit as to make it clear that he asks for a decree against the whole interest. In investigating this question the Court should consider the frame of the suit, the judgment and the decree, and in order to construe it as a representative suit some indication however slight must be found to show that the creditor intended so to frame it; and if the suit is in form only a simple money claim against the limited owner, although in point of fact the debt may have been contracted for necessary purposes, it cannot be held that the reversionary interest can be bound: (*Case law discussed*). [P 186 C 1, P 187 C 1]

S. Panchapagesa Sastri and K. R. Krishnaswami Ayyar—for Appellant.

M. S. Venkatarama Aiyar and V. Srinivasa Aiyar—for Respondent.

Judgment.—This appeal is against an order bringing the appellant on record in O. S. No. 343 of 1923 on the file of the District Munsif's Court of Mannargudi as the legal representative of the judgment-debtor, a woman named Vedathammal. The respondent is the decree-holder and he obtained a money decree against Vedathammal and attached a house in which she enjoyed a limited estate. While it was under attachment she and her father as next reversioner joined in selling it under Ex. D to the appellant. The latter filed a claim petition during the pendency of which the judgment-debtor died. Subsequently the appellant obtained another sale-deed from the same reversioner. The question is whether as purchaser of the property he can be brought on as her legal representative.

The learned District Munsif considers that the decree in O. S. No. 343 of 1923 may be construed as against Vedathammal in her representative capacity and not merely against her personally. The lower appellate Court has differed from this view, but considers that the appellant is estopped by certain conduct from contesting his liability for the decree. I will deal with this latter point first. The learned Judge of the Court of Small Causes has disposed of it very briefly in

para. 13 of his judgment and has not given with any clearness the reasons which support the view he takes. But the fact he apparently relies upon is that under Ex. D a sum of money was served to pay the decree-holder if the decree was eventually confirmed on appeal. The inference drawn from this argument, that the reversioner thereby acknowledged that the debt was of such a character as to be binding upon the reversion, appears to me wholly to misconceive the position. Whether or not the debt was so binding, during the life-time of the limited owner the decree-holder could proceed against her interest in the property, and so long as she lived the purchaser held it subject to this risk. It was perfectly reasonable therefore that he should only buy it on the condition that so much of the purchase-money as was necessary should be reserved for payment of the debt in case of need, and it is clear that a stipulation to this effect involved no acknowledgment that the debt was binding not only upon the limited owner's interest, but also upon the reversionary interest. No question of estoppel therefore arises.

The next question is whether the suit was so framed as to enable the decree-holder to proceed against the absolute interest now enjoyed by the appellant as the reversioner's representative. The suit was against the limited owner only; it was a simple money claim upon a debt, and no issue was raised as to whether the debt was binding on the estate. Can the decree-holder show in execution of such a decree that the debt was in fact binding so that he may bring on the appellant as representative of the reversionary interest and proceed against the property in his hands? There is no doubt that the answer to this question depends upon the view taken of the frame of the suit, whether it may be construed as aimed at the whole estate by virtue of the binding character of the debt or whether the plaintiffs did not look beyond the interest of the limited owner. There is a quantity of case-law upon this subject. In one line of cases, of which *Nugender Chander Ghose v. Kaminee Dossee* (1), *Bai Jun Doobey v. Brij Bhokun Lal Anusti* (2), *Deendyal Lal v. Jugdeep Narain Singh* (3)

and *Lalita Mohan Pal v. Dayamoyi Roy* (4) may be cited as examples, the principle is stressed that it is incumbent upon the plaintiff so to frame his suit as to make it clear that he asks for a decree against the whole interest. In the case last cited above the Privy Council quote with approval a passage in the judgment of the High Court of Calcutta to the effect that in order to make the estate liable a creditor must frame his suit in the proper manner, whereas in the instance then under consideration all that he asked and the Court granted was a personal decree against the debtor. There was no indication that the debtor was a party to the suit as representative of the estate. Another line of cases, while conceding that the actual frame of the suit is an important factor in the decision, take also other facts into consideration in attempting to arrive at the plaintiff's intention.

Instances of cases in which the frame of the suit was not regarded as decisive are *Jugul Kishore v. Jotendro Mohun Tagore* (5), *Nanomi Babuasin v. Modhun Mohun* (6), *Simbhunath Pande v. Golap Singh* (7), *Radha Kissen v. Nauratan Lal* (8) and *Veerabadra Aiyar v. Marudaga Nachiar* (9). The judgment in *Devji v. Sambhu* (10) has been cited as another decision on the same lines, but I do not think that the facts were really analogous, because the case was one of a mortgage executed by a mother who had minor sons, and the only way in which the creditor could have got any title at all was by virtue of an intention that the estate should be bound. So far as this Court is concerned it is unnecessary for me to look further than to the judgment in *Veerabadra Aiyar v. Marudaga Nachiar* (9), which passes a number of previous decisions in review. The stage at which the question arose there was after sale. But some of the tests applied will serve equally in the present circumstances.

"In investigating this question," the learned Judges say "the Court is not confined to any one fact. The sale certificate is no doubt the most

(4) A. I. R. 1927 P. C. 41=105 I. C. 469 (P.C.).

(5) [1884] 10 Cal. 985=11 I. A. 66=4 Sar. 553 (P. C.).

(6) [1886] 13 Cal. 21=13 I. A. 1=4 Sar. 682 (P. C.).

(7) [1887] 14 Cal. 572=14 I. A. 77=5 Sar. 5 (P. C.).

(8) [1907] 6 C. L. J. 490.

(9) [1911] 34 Mad. 188=8 I. C. 1072.

(10) [1900] 24 Bom. 135=1 Bom. L. R. 627.

(1) [1866] 11 M. I. A. 241=8 W. R. 17 (P.C.).

(2) [1875] 1 Cal. 133=2 I. A. 275=24 W. R. 306=3 Sar. 541=3 Suth. 207 (P.C.).

(3) [1877] 3 Cal. 198=4 I. A. 247=3 Sar. 720=3 Suth. 468 (P.C.).

important document as the instrument conferring title, but is not conclusive. The frame of the suit, the judgment, the decree, the execution proceedings, the advertisements for sale, the adequacy or inadequacy of the purchase-money and the conduct of the parties are all circumstances which may legitimately be considered in an inquiry of this nature."

Of course in the present case we can only consider the frame of the suit, the judgment and the decree; and I think it is clear from the observations quoted above that in order to construe it as a representative suit some indication, however slight, must be found to show that the creditor intended so to frame it. In the case under reference, the learned Judges look for and succeed in finding such indications. No other case that I have seen goes further in placing a liberal construction upon the creditor's intentions, and I think therefore that it may safely be said that, unless such indications can be pointed to, and if the suit is in form only a simple money claim against the limited owner, although in point of fact the debt may have been contracted for necessary purposes, it would be going beyond any reported decision to hold that the reversionary interest could be bound. This has been clearly and as a summary of the case-law I think correctly, stated by Mayne (Edn. 9, p. 641), where speaking of a female heir, he says:

"Where the suit is founded upon a purely personal debt or contract of her own, the decree can only be against her own person and property, and a sale in execution will only convey her own interest in the property. But even though the foundation of the decree be a liability which might bind reversioners, that alone is not sufficient. The suit must be so framed as to show that it is not merely a personal demand upon the female in possession, but that it is intended to bind the entire estate, and the interests of all those who come after her. The reason of this is that, although in a suit brought to recover, or charge an estate of which a Hindu female is the proprietress she will, as defendant, represent and protect the estate, as well in respect of her own as of the reversionary interest; still and on this very account, the plaintiff is bound to give notice that he is seeking so large a remedy, in order to put those who may be ultimately affected upon their guard, to enable them to protect themselves."

Turning now to the facts of the present case, there is only one recital in the plaint which can by any stretch of construction be interpreted as a reference to the binding character of the debt. The promissory note upon which the suit was brought recited purposes to which the money was to be applied, which no doubt would be binding upon the reversioner; and this passage in the plaint refers to the promis-

sory note the value of which "as per details in cash" the defendant is alleged to have received. The learned District Munsif has accepted his reference to the contents of the promissory note as a sufficient expression of the plaintiff's intention to proceed against the absolute estate

"by stating that the loan under the pro-note sued on was borrowed by the defendant as per detail set out in the pro-note."

The learned Judge of the Court of Small Causes is unable to follow him in this and however much the decree-holder's claim may enlist one's sympathy I think that even if we had no external help to the construction of the plaint, it would be impossible to hold that the required intention was disclosed by this passage. There is however a piece of evidence which seems to me to destroy any presumption upon this point. The respondent has admitted that at the time the money was borrowed he believed that Vadathammal enjoyed an absolute interest in the property, and so far as appears he was under this misapprehension even when he filed the plaint. That being so I do not see how it is possible to hold that he framed or intended to frame the suit in the manner required to bind ulterior interests in the property. The argument has been advanced that although he may have been under this misapprehension, the suit did in fact contemplate the liability of the whole property and so the necessary condition was fulfilled. I am unable to agree. In a suit framed on the supposition that the estate was not limited it was not even necessary to assert the binding character of the debt and the suit was purely one for a personal decree for the money against the debtor. When the suit was so indisputably of this character it is certainly idle to look for any indications of the creditor's intention to frame it in such a way as would be appropriate in the case of a debt contracted by a limited owner and binding on the whole estate. And I think it would be going beyond any reported decision to hold that a suit brought in such circumstances may be deemed to be so framed as to enable the reversionary interest to be proceeded against. I cannot accordingly find that the appellant is representative of any interest bound by the decree and I must allow the appeal, set aside the lower Court's orders and dismiss the application with costs throughout.

P.R.S./B.V. Appeal allowed.

A. I. R. 1932 Madras 188

MADHAVAN NAIR AND JACKSON, JJ.

A. R. M. Karuppan Chettiar—Appellant.

v.

K. L. S. V. E. Subramaniam Chettiar—Respondent.

Appeal No. 30 of 1928, Decided on 10th September 1931, against order of Sub-Judge Sivaganga, D/- 21st September 1927.

(a) Civil P. C. (1908), S. 145 — Personal liability attaches to surety for costs—Liability is not excluded by deposit of money as security.

A surety for costs payable by a party to a suit is personally liable for the costs and the mere fact that he deposits certain amount by way of security does not exclude his personal liability [P 188 C 2]

(b) Civil P. C. (1908), S. 145—No security bond executed—High Court passing order in general terms—Obligation of surety is not limited to decree of first Court.

Where no security bond has been executed by a surety for costs to be paid by the plaintiff and the High Court in appeal passes an order in general terms, viz., "for costs of the suit" the obligation of the surety is not limited to the decree of the first Court. [P 188 C 2]

K. S. Venkatarama Ayyar—for Appellant.*K. S. Sankara Ayyar*—for Respondent.

Madhavan Nair, J.—In this case the appellant stood surety for the costs payable by the plaintiff in O. S. No. 67 of 1919. The suit was originally dismissed for default. On appeal it was restored and the High Court made it a condition precedent to the restoration of the suit that the plaintiff should furnish security for Rs. 1,000 for costs of the suit. The appellant deposited Rs. 1,000 as security. In the first Court a decree was given for the plaintiff. Then the appellant withdrew the amount deposited into Court. On appeal that decree was set aside. An application was made by defendant 1 to the lower Court for an order directing the appellant to bring into Court his costs of the suit on the ground that he has stood surety for costs and the lower Court made an order in terms of the application. The appeal is against this order.

Three points have been argued before us. The first point is that the appellant has not undertaken any personal liability for the costs and so under S. 145, Civil P. C. no proceedings can be instituted against him. It is argued that the fact that the appellant deposited Rs. 1,000 as security would show that no personal liability was contemplated between the parties. The decision in *Brajendra Lal Das v. Lakhmi*

Narain Khanna (1), is relied on in support of the contention. But in that case the facts clearly show that when the promissory notes were deposited as security, it was distinctly understood that there was to be no personal liability so far as the surety was concerned. It is admitted that the appellant is a surety, and from the bare fact that he deposited Rs. 1,000 it cannot be inferred that personal liability, which attaches to every surety, is excluded. We think that the lower Court is right in holding that the appellant is personally liable for the costs.

The second point urged is that the obligation of the surety came to an end with the decree of the first Court and that it did not extend to the decree passed by the High Court. The question is one of some difficulty in this case as no security bond has been executed by the appellant; we have to infer from the order passed by the High Court the scope of the liability of the appellant. The decisions relied on by his counsel do not give us very much help. In *Subbarama Aiyer v. Subba Aiyer* (2), the facts show that the security was given in connexion with O. 38, R. 5. The learned Judges held that as soon as the suit was dismissed the security ceased to exist. That case does not apply; and so we have to decide the case on the wording of the order passed by the High Court. The order is in general terms: "For the costs of the suit". The learned Judges have not restricted the security to be given to the costs of the defendants which might be ordered by the decree of the first Court. We think on a construction of the order of the High Court, it cannot be said that the obligation of the surety is limited to the decree of the first Court.

The next point argued is that the order permitting the appellant to withdraw the money operates as *res judicata* and that none of the questions argued can be raised now. Having regard to the order it is difficult to see how the respondent is precluded from raising these questions. His counter affidavit filed in connexion with the petition says that he had then no objection to the withdrawal of the money. That is all. It cannot be held that all the questions now raised between the parties can be constructively said to have been decided in the course of that proceeding.

(1) [1915] 29 I. C. 149.

(2) A. I. R. 1925 Mad. 114=32 I. C. 461.

In these circumstances we uphold the order of the lower Court and dismiss this appeal with costs.

P.R.S./R.M. *Appeal dismissed.*

A. I. R. 1932 Madras 189

WALLER AND PANDALAI, JJ.

Vyraperumal Mudaliar—Defendant—Appellant.

v.

K. Alagappa Maniagarar and others—Plaintiffs—Respondents.

Second Appeal No. 274 of 1929, Decided on 2nd September 1931, against decree of Sub-Judge, Dindigul, in A. S. No. 24 of 1928.

(a) **Cosharer**—Cosharer paying arrears of rent to prevent arrest for decree against himself and another cosharer and claiming contribution is entitled to charge but not to first charge—**Madras Estates Land Act (1908), Ss. 5 and 128—Transfer of Property Act (1882), Ss. 82 and 100.**

A cosharer, who to prevent arrest for a decree against himself and another cosharer for arrears of rent due by both under the Estates Land Act pays the arrears of rent and brings a suit for contribution, is entitled to a charge on the other cosharer's portion of the holding, but is not entitled to a first charge, i. e., priority over encumbrances existing on the property, on the date of the payment by reason of which he claims contribution. Ss. 5 and 128, Estates Land Act, are not applicable to the case nor do Ss. 82 and 100, T. P. Act, support such claim. The claim being against the co-owner and the charge which springs into existence on the date of payment being against his property it can only avail against that property as it stood on the date of payment and cannot avail retrospectively against prior mortgagees and others who have in good faith and without any suspicion that such a charge may come into existence in future advanced money on the property : *A. I. R. 1914 P. C. 111; A. I. R. 1928 Mad. 1074; 43 Mad. 786 and 26 Mad. 686 (F.B.), Ref.; A. I. R. 1926 Mad. 141; 26 Mad. 686 (F.B.); 28 Mad. 493; 11 M. I. A. 241 (P.C.) and A. I. R. 1931 P. C. 226, Dist.*

(b) **Madras Estates Land Act (1908), S. 5—Charge created by S. 5 applies to rents only so long as it is due to landlord as such.**

The charge created by S. 5 is for the benefit of the landholder and applies to rent only so long as it is due to him in that character : *A. I. R. 1914 P. C. 111, Ref.* [P 190 C 1]

(c) **Madras Estates Land Act (1908), S. 128—S. 128 creates new right in favour of different persons who would be affected by sale of holding for rent—Charge is given to persons other than landlord and for sum different from rent.**

Section 128 has nothing to do with S. 5. It creates an entirely new right in favour of different persons, i. e., who like mortgagees or other owners of subordinate interest in the holding would be adversely affected by the sale by the Revenue Court of the holding for rent i. e., those against whom the purchaser's right would prevail by S. 125. The right given by S. 128 is a charge

given to other persons than the landlord for a sum different from the rent and given only in the particular circumstances mentioned, i. e., that a sale by the Revenue Court has been averted after proclamation for sale by that Court : *A. I. R. 1928 Mad. 1074; 43 Mad. 786 and A. I. R. 1922 Cal. 32, Ref.* [P 190 C 2]

(d) **Madras Estates Land Act (1908), S. 128—Cosharers like joint pattadars are not within intent of S. 128. (Obiter)**

(Obiter) Cosharers like joint pattadars are not within the intent of S. 128 which is intended to benefit not the pattadar or his joint pattadar who are the persons liable to pay rent and on whose default their holding is under sale but others who though not liable to pay the rent have subordinate interests in the holding which are liable to be destroyed by the sale. [P 190 C 2]

(e) **Madras Estates Land Act (1908), S. 5—Charge under, is not one under Transfer of Property Act (1882), S. 100.**

The charge for rent created by the Estates Land Act is not a charge within the meaning of S. 100, T. P. Act : *42 Mad. 114, Rel. on.* [P 192 C 2]

(f) **Contribution—One person getting advantage from act of another—Right of contribution towards expenses does not necessarily arise.**

There is no general principle of law that where one person gets some advantage from the act of another a right of contribution towards the expenses for that act arises on behalf of the person who has done it : *Ruabon Steamship Co. v. London Assurance Co., (1900) A.C.6 and 26 Mad. 686, Foll.* [P 193 C 1]

T. V. Muthukrishna Ayyar and P. N. Appuswami Ayyar—for Appellant.

B. Sitarama Rao—for Respondent.

Judgment.—The question in this second appeal is whether a cosharer who to prevent arrest for a decree against himself and another cosharer for arrears of rent due by both under the Estates Land Act pays the whole rent and brings a suit for contribution is entitled to a first charge on the other cosharer's portion of the holding.

The plaintiff and his cousin, defendant 1's late husband, were jointly holders of ryoti land in the Ayakudi Zamin. They divided the holding among themselves in 1906 but as the patta remained joint in the zamin accounts they were jointly sued for rent for Faslis 1323, 1324 and 1325 (1914 to 1916) and a personal decree was obtained against them in the Revenue Court by the zamindar. The plaintiff's cousin not having paid his share of the decree debt the plaintiff was, on threat of arrest, compelled to pay, in addition to his own share, the share of his cousin also on 2nd July 1926. This suit was brought on 11th August 1926 to enforce the plaintiff's right of contribution impleading defendant 1, the widow of the cousin, who had died and defendants 2 and 4 who are mortgagees

of the cousin's share of the holding and defendants 5, 6 and 7 purchasers of portion of that share. The plaintiff claimed in addition to a decree against the widow (defendant 1) a charge against the property in priority to the interests of defendants 2 to 7. The Munsif granted a decree against the widow and also made the decree amount a charge on the property subject to the rights of the contesting defendants 2, 5 and 7. The defendants did not appeal. But the plaintiff appealed to the learned Subordinate Judge who declared that the plaintiff was entitled to a charge for his decree amount in preference to the defendant's interest, i. e., a first charge on the land.

Defendant 2, a mortgagee, appeals to this Court and the only point argued in the appeal is that though the plaintiff may be entitled to a charge, he is not entitled to a first charge, i. e., to priority over encumbrances existing on the property on the date of the payment by reason of which the plaintiff claims contribution.

The learned Subordinate Judge's opinion is that plaintiff is entitled to a charge and a first charge by virtue of Ss. 5 and 128, Estates Land Act, and he also relies on *Kottayya v. Kotappa* (1), which he says is a direct authority on the point. The learned advocate for the respondent-plaintiff does not support the Judge's opinion on these grounds but he argues that the plaintiff is entitled to a charge and first charge on grounds outside the Estates Land Act, i. e., on general principles and on Ss. 82 and 100, T. P. Act.

The learned Judge's grounds are clearly incorrect. What S. 5 declares in effect is that, subject to any right of Government, the rent of raiyati land shall be a first charge on the holding and on the produce of the holding or any part thereof. That is a charge created for the benefit of the landholder and applies to rent only so long as it is due to him in that character: *Forbes v. Maharaj Bahadur Singh* (2). The present claim is not for rent but for contribution by a raiyat against his cosharer though the claim arises from the former's payment of rent which the latter was bound to pay which is a different thing. S. 128 is still less applicable though the Judge says erroneously that it only reiterates the right which the parties are

entitled to under S. 5. S. 128 has nothing to do with S. 5. It creates an entirely new right in favour of different persons i. e., those who like mortgagees and other owners of subordinate interests in the holding would be adversely affected by the sale by a Revenue Court of the holding for rent, i. e., those against whom the purchasers' right would prevail by S. 125. Such persons are given the right when a proclamation for sale is made to pay to the Collector or selling officer the amount requisite to prevent the sale and in case they do so they are entitled in respect of the sum paid and interest thereon at 6% to a charge in priority to every other charge except the landlord's charge for arrears of rent and any prior charge in respect of previous payments under the same section.

It is clear that this is a charge given to other persons than the landlord, for a sum different from the rent and given only in the particular circumstance mentioned, i. e., that a sale by the Revenue Court has been averted after proclamation for sale by that Court: *Subbarayadu v. Venkataratham* (3), *Venkatalakshamma v. Seetayya* (4), *Sital Chandra v. Parbati Charan* (5). As there was no proclamation of sale in this case but only a threatened arrest of the plaintiff, S. 128 would be of no use to the plaintiff even if a cosharer were to be held as included in the class of persons on whom a charge is conferred by that section. We may however say, though it is not necessary to decide it, that in our opinion cosharers like joint pattadars are not within the intent of that section which seems to have been intended to benefit not the pattadar or his joint pattadar who are the persons liable to pay the rent and on whose default their holding is under sale but others who though not liable to pay the rent have subordinate interests in the holding which are liable to be destroyed by the sale. As in this section, the persons mentioned in S. 35, Madras Revenue Recovery Act, S. 9, Bengal Acts 1 of 1845 and 11 of 1859 as paying or depositing money to save the estate are persons other than the proprietor of the estate in arrear. The decision in *Kottayya v. Kotappa* (1) has also no application to the case so far as the question

(1) A.I.R. 1926 Mad. 141=90 I.C. 551.

(2) A.I.R. 1914 P.C. 111=23 I.C. 632=41 I.A. 91=41 Cal. 926 (P.C.).

(3) A.I.R. 1928 Mad. 1074=110 I.C. 136=51 Mad. 632.

(4) [1920] 43 Mad. 786=57 I.C. 764.

(5) A.I.R. 1922 Cal. 32=69 I.C. 841.

of first charge is concerned. All that it decided was that a person like the plaintiff who pays off the share of rent due by his cosharers is entitled according to the Full Bench decision in *Rajah of Vizianagaram v. Rajah Setrucherla Somasekararzu* (6), to a charge by operation of law in the co-sharer's share of the holding and that there is nothing in S. 132, Estates Land Act, which prevents the civil Court from enforcing that charge in a suit in a civil Court.

The grounds stated by the learned Judge being thus unavailing to support his opinion as to a first charge, the learned advocate for the respondent has sought to support it by appealing to the general law on grounds of justice, equity and good conscience and he has also invoked by way of analogy the law of mortgages as stated in Ss. 82 and 100, T. P. Act, as now amended. As to the general law no authority is forthcoming to support the contention and we are not aware of any. The decision in *Rajah of Vizianagaram v. Rajah Setrucherla Somasekararzu* (6) was referred to. But all that it decided was that where a cosharer in an estate subject to payment of Government revenue pays the whole revenue to save and does save the estate from liability to sale by Government he is by operation of law entitled to a charge upon the share of his cosharers for the latter's share of the revenue. There was no question in that case of priority between such charge and a mortgage by any of the defaulting cosharers of his share. Certain observations at p. 703 were referred to as tending to show that in the opinion of Bhashyam Ayyangar, J., a part owner paying the revenue will acquire a priority of charge over mortgagees. But the learned Judge himself says that he was not expressing any decided opinion as no question of priority arose in the case. It is also to be noted that the observations were made with reference to S. 35, Revenue Recovery Act, which does not mention co-owners but only lessees and mortgagees and persons out of possession claiming adversely to the defaulter and in their case confers on payments to prevent a revenue sale only a priority of charge according to date of payment. We are bound by this decision, but we find in it and in *Alayakammah v. Subbaraya Goundan* (7), which followed

it nothing to support the respondent's contention as to priority.

Such indications as there are in decisions arising from the Revenue and Rent laws to which we have been referred lend no support to the argument. In *Nugender Chander Ghose v. Kamisee Dossee* (8) the widow of the mortgagor of a taluk which was liable to pay Government revenue having failed to pay it the mortgagee had to pay it to preserve her security. The mortgagee having obtained a decree against the widow under S. 9, Act 1 of 1845, the question was whether it could be executed against the whole estate including the reversionary interest or whether it was a personal decree executable only against the widow's estate. The payment was made under S. 9, Act 1 of 1845, by which a person interested in saving the estate from a revenue sale was authorized to deposit the revenue with the Collector to the credit of the estate and if he established before a civil Court that he had an interest which would suffer by the sale he was entitled to recover the amount deposited with interest from the proprietor of the said estate. The decree obtained was in pursuance of this provision. The Zillah Judge allowed the claim of the mortgagee decree-holder to execute the decree against the estate. The High Court reversed this, holding that the decree obtained under S. 9, Act 1 of 1845, was a personal one. In the Privy Council their Lordships upheld this view, at the same time intimating that the mortgagee could by adopting the proper form of suit have proceeded against the estate. They say:

"Considering that the payment of the revenue by the mortgagee will prevent the taluk from being sold, their Lordships would if that were the sole question for their consideration find it difficult to come to any other conclusion than that the person who had such an interest in the taluk, as entitled him to pay the revenue to Government and did actually pay it was thereby entitled to a charge on the taluk as against all persons interested therein for the amount of the money so paid."

After stating that the question did not come before them in that form, but whether the charge could be enforced in the suit as actually brought, they proceed:

"There were two courses open to her (mortgagee): she might have instituted a suit to enforce the mortgage and to tack to the mortgage the amount of the revenue paid by her to save the estate and to have the estate sold to pay that amount; or she might proceed under S. 9, Act 1 of 1845."

(6) [1903] 26 Mad. 686=13 M. L. J. 83 (F. B.).

(7) [1905] 28 Mad. 493=15 M. L. J. 219.

(8) [1866] 11 M. I. A. 241=8 W. R. 17 (P. C.).

The question of priority was not before the Privy Council, but if we may derive guidance from this passage the method of enforcing the charge above laid down by tacking it on to the mortgage would seem to imply that an earlier mortgage would not be affected. The decision of the same tribunal in *Monohar Das Mohanta Maharaj v. Hajarimull Babu* (9), turned on the corresponding S. 9, Act 11 of 1859, which replaced Act 1 of 1845. The point decided has no bearing on the point before us. It was that a mortgagee who has obtained a decree for sale may maintain a separate suit for having the amount of revenue subsequently paid by him to save the property added to the decree amount. The point of present interest is that the absence of any charge in favour of a person paying revenue under the earlier Act was supplied by the addition of a sentence in S. 9 of the new Act to the effect that the amount deposited shall be added to the amount of the original lien of the person so depositing. There was in addition a covenant in the mortgage sued on, that amounts paid by the mortgagee for revenue defaulted by the mortgagor were to be added to the mortgage amount. Thus both by statute and by contract the payments made by the mortgagee in the case could only rank with the mortgage money. This is all that was decided though the expression "first charge in the sale proceeds" is used in the decretal portion of the judgment and the words "first charge" occur in an earlier passage. We do not read the decision as holding that the plaintiff was granted a charge in priority to the first mortgage which was usufructuary and which therefore does not appear to have been intended to be paid off out of the sale proceeds.

There being nothing in the Estates Land Act to support the plaintiff's claim to a first charge in the circumstances of this case, the question is whether Ss. 82 and 100, T. P. Act support it. The argument was put in this form. The charge for rent is a charge created by operation of law within the meaning of S. 100, T. P. Act, and subject to all the incidents of a simple mortgage. The pattadars are in the position of co-mortgagors. Therefore one of them paying off the charge is entitled as against the other to contribution under S. 82 for his excess payment and

by virtue of S. 92 is entitled to stand in respect of priority in the same position as the charge paid off, i.e., before all the mortgages created by the defaulter. There is more than one answer which is fatal to this reasoning. That the charge for rent created by the Estates Land Act is not a charge within the meaning of S. 100, T. P. Act, was decided in *Suramma v. Suriyanarayana Jagapathi Razu* (10), though Sadasiva Ayyar, J., doubted this in *Venkatalakshamma v. Seetayya* (4). However that may be, and assuming that it is a charge within S. 100, T. P. Act, it is clear that it is not the landlord's charge for rent which plaintiff claims, but something different though, having its roots there. The decision of the Privy Council in *Forbes v. Maharaj Bahadur Singh* (2), already referred to has been understood in this Court in *Subharayudu v. Venkataratnam* (3) as applicable to cases under the Estates Land Act and as meaning that the claim of first charge is available only to a landlord and while the relationship of landlord and tenant subsists. The plaintiff's charge for the first time came into existence on his payment of his cosharer's share of the rent and both its character and extent are determined by the equitable doctrine that common burdens should be equally borne and

"once the right of contribution is established it is not an inequitable or violent stretch of such right to make it a charge against the co-owner's share, at any rate in certain classes of cases and as against him. *Rajah of Vizianagram v. Raja Setrucherla Samasekararaz* (6)".

The claim being thus against the co-owner and the charge which springs into existence on the date of payment being against his property it follows that it can only avail against that property as it stood on the date of payment and cannot avail retrospectively against prior mortgages and others who have in good faith and without any suspicion that such a charge may come into future existence advance money on the property. The same result is arrived at by the rule now expressly stated in S. 100 that save as expressly provided by any law for the time being in force no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge. When the real nature of the landlord's charge and of

(9) A. I. R. 1931 P. C. 226=134 I. C. 645=58 I.A. 341 (P.C.).

(10) [1919] 42 Mad. 114=48 I.C. 794.

the plaintiff's charge is understood, there is no basis for the application of Ss. 82 and 92, T. P. Act (old Ss. 82 and 101) by treating the plaintiff as a co-mortgagor who has redeemed a previously existing mortgage or charge.

But it is contended that all the interests in the property which have benefited by the rent sale being averted by the plaintiff's payment including the mortgages existing in the property must be subjected to the charge. For this the expression in the Privy Council decision in *Nugender Chander v. Kaminee Dossee* (8), at p. 258 already referred to that the charge is against all persons interested therein which is extracted in the later Privy Council decision is relied on. The question of priority not being before their Lordships in either case it is not permissible to give a meaning to their words which have no bearing to the facts before them. On the contrary there is the authority of the House of Lords in *Rutabon Steamship Co. v. London Assurance Co.* (11), which is referred to by Bhashyam Ayyangar, J., in *Rajah of Vizianagaram v. Raja Setrucherla Somasekararaz* (6) for the view that there is no general principle of law that where one person gets some advantage from the act of another a right of contribution towards the expenses for that act arises on behalf of the person who has done it. In the Allahabad case *Seth Chetor Mal v. Shib Lal* (12) the contention was as in this case that the charge should prevail over a prior mortgage. The decision denied not only the priority but the charge. Though on this last point *Rajah of Vizianagaram v. Raja Setrucherla Somasekararaz* (6) came to the opposite conclusion and is the binding authority in this Court, the discussion shows that it does not follow that because the plaintiff may be entitled to a charge, he is also entitled to priority over encumbrances existing on the date of payment.

In our opinion the plaintiff-respondent has not established any right to a prior charge in preference to the contesting defendants 2, 5 and 7. The decree of the lower appellate Court is reversed and that of the District Munsif restored. The ap-

pellant will have his costs here and in the Court below from respondent.

P.R.S./R.M.

Decree reversed.

A. I. R. 1932 Madras 193

RAMESAM AND CORNISH, JJ.

Vythilinga Pandarasannadhi—Appellant.

v.

Board of Control, Thiagarajaswami Devasthanam—Respondent.

Appeals Nos. 455 and 456 of 1930, Decided on 13th April 1931, against orders of Sub-Judge, Negapatam, D/- 17th November 1930.

(a) Decree—Decree-holder need not be a party to the decree.

A decree-holder need not be a party to the decree. It is enough if the decree confers some right enforceable under the decree upon some persons mentioned in it: *A. I. R. 1932 Mad. 41*; *A. I. R. 1930 Mad. 918* and *A. I. R. 1928 Mad. 61, Ref.*; *A. I. R. 1924 Mad. 369* and *A. I. R. 1929 Mad. 625, Dist.* [P 194 C 2]

(b) Civil P. C. (1908), S. 51 and O. 40, R. 1—Receiver can be appointed whenever it is just and convenient.

According to S. 51, one of the modes of obtaining execution is by the appointment of a receiver and under O. 40, R. 1, a receiver can be appointed wherever it is just and convenient. It is provided that a receiver shall not be appointed so as "to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove". This proviso clearly refers to a case where the person in possession is a third party and the parties to the suit have no present right to disturb him.

Where the dispute is between parties to the suit, if it is just and convenient for the purpose of enforcing or carrying out the directions in the decree, a receiver can be appointed even where the party in possession is not liable to be removed: *61 I.C. 605* and *A.I.R. 1927 Mad. 1073, Rel. on.* [P 195 C 1, 2]

(c) Civil P. C. (1908), S. 51—Temple property—Receiver—When he should be appointed.

Where a scheme is drawn up for the management of a temple and the temple trustee is thereby directed to submit the budget and the accounts of the temple property to a treasurer appointed by the Board of Control as directed by the scheme and where the trustee fails to comply with these directions, the Court in its discretion may appoint a receiver of the property for a specified time instead of ordering arrest of the trustee or attachment of his property for his mismanagement of the temple property, when the trustee has given an undertaking to repay the loss: *A.I.R. 1925 P.C. 139* and *A.I.R. 1926 Pat. 542, Ref.* [P 195 C 2]

K. Rajah Ayyar and *R. Sundaralingam*—for Appellant.

S. Varadachariar and *A. Swaminatha Ayyar*—for Respondent.

(11) [1900] A. C. 6=69 L. J. Q. B. 86=81 L. T. 585=48 W.R. 225=9 Asp. M. C. 2=5 Com. Cas. 71=16 T.L.R. 90.

(12) [1892] 14 All. 273=(1892) A. W. N. 117 (F.B.).

Ramesam, J.—These are appeals under S. 47, Civil P. C., against the orders of the Subordinate Judge of Negapatam in E. A. Nos. 11 and 84 of 1930 in O. S. 125 of 1921, which was a suit filed for the framing of a scheme for the temple of Sri Thiagarajaswami at Tiruvarur in East Tanjore District. The matter came up to the High Court before Spencer, J., and myself and a scheme was framed. Under Cl. 8 of the scheme the trustee of each kattalai was directed to submit a budget to the treasurer of his expected receipts and expenditure and the treasurer was directed to consolidate the budgets of all the kattalais and place them before the Board for their approval and orders. Under Cl. 13 of the scheme the trustees of the respective kattalais were directed to hand over all the cash proceeds of their property to the treasurer who had to keep them in a safe within the temple premises, enter them in a book to be kept with separate pages for each kattalai for that purpose and furnish the trustees with receipts for the same and be responsible for their safe custody, and the treasurer was directed to put the trustees in funds from the amounts in his hands to their respective credits whenever they apply for disbursements according to the budget.

In pursuance of the scheme the President of the Board of Control insisted on the trustees of the kattalais sending complete budgets of receipts and expenditure and on their failing to do so he applied for attachment of their property or their arrest. The Subordinate Judge dismissed the petition. There was an appeal to the High Court. That appeal came on before this very Bench and it was held on an objection that the decree in the original suit was not an executable one, that the directions in Cls. 8 and 13 of the scheme were executable and not merely declaratory. Our judgment was reported in *Thiagarajaswami Devasthanam v. Balayee Ammal* (1). The present application is by the Board of Control acting through their President for the appointment of a receiver for the properties under the control of 12th defendant who is the trustee of Abisheka and Annadana kattalais for the purpose of carrying out the duties which the trustees have to perform under Cls. 8, 13 and 16 of the scheme alleging default on the part of the trustees

in regard to their duties. The petitions were actually pressed before the Subordinate Judge in respect of only Cl. 13. The complaint made against the trustee is that he had persistently not been making remittances, nor sending accounts, showing collections from Fasli 1338 downwards. The Subordinate Judge found that the appellant was guilty of continuous and persistent defiance not only of the directions in the scheme to make remittances of money collections but also the orders of Court made from time to time and that he paid only a small portion of the money received by him. In para 6 of the judgment there is a table showing the actual income and remittances to the treasurer. The appellant admitted on 2nd September 1929 that he received a sum of nearly Rs. 5,000 between 29th March and 23rd August 1929 but did not remit it to the treasurer and spent it himself. Other defaults are mentioned by the Subordinate Judge in the same paragraph. Similar complaints were made in 1928 and also in 1929. Nothing further was done on the ground that an undertaking was given by him: vide Exs. E and E-1. In the present petition he was required to produce all the accounts. He has not done so. The Board of Control made a rule that he should send monthly budgets, but this was not done. Accordingly the Subordinate Judge appointed a receiver. It is against this order that the present appeals are filed.

In appeal the point strenuously pressed is that the appointment of a receiver is not a proper remedy, on various technical grounds. First it is argued that the Board of Control was not a party to the decree; it was a creation of the decree itself and could not be a party; therefore it cannot be a decree-holder and cannot execute the decree. The reply to this argument is that a decree-holder need not be a party to the decree. It is enough if the decree confers some right enforceable under the decree upon some persons mentioned in it. The right of calling upon the trustees to remit the collections is conferred upon the Board of Control. The Board may therefore be regarded as a decree-holder: vide *Varadiah Chetty v. Narasimhulu Chetti* (2), and cases cited therein. The decision in *Sivarama Dubai v. Raja-*

(1) A.I.R. 1928 Mad. 61=107 I.C. 136.

(2) A. I. R. 1932 Mad. 41=134 I. C. 60=54 Mad. 345.

gopala Misra (3), does not help the appellant, as it did not relate to a matter in execution. We have already held in *Thyagarajaswami Devasthanam v. Balayee Ammal* (1) that these clauses of the scheme may be regarded as executable. The decisions in *Ranganatha Thathachariar v. Krishnaswami Thathachariar* (4), and *Veerappa v. Padmanabha*, A. I. R. 1929 Mad. 625, are distinguishable as the applications in those cases related not to matters in execution but to other matters.

It is then argued that the proper method of compelling the trustee of Annadana and Abisheka kattalais to obey the directions in the scheme is by attaching the property or arresting him and not appointing a receiver. It may be that attachment of property and arrest of the judgment-debtor are two modes of enforcing obedience by the judgment-debtor to the directions in the decree. But in the present case the object of the application is not only to compel obedience on the part of the judgment-debtor, but also to obtain the collections made on behalf of the kattalais, and to ensure the production of accounts as regards collections. The learned advocate for the appellant argued that the appointment of a receiver is a mode of equitable execution under the English law and referred to English authorities to show that it cannot be justified in circumstances like these. We have nothing to do with those authorities. Even in England a wider discretion is conferred upon Courts by the Judicature Act; but in practice even under the Judicature Act the Courts would appoint receivers only in cases where those could have been appointed prior to the Act. But under the Civil Procedure Code we are not restricted by considerations of this kind. According to S. 51, Civil P. C., one of the modes of obtaining execution is by the appointment of a receiver and under O. 40, R. 1, Civil P. C., a receiver can be appointed wherever it is just and convenient; and it is provided that a receiver shall not be appointed so as

"to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove."

This proviso clearly refers to a case where the person in possession is a third party and the parties to the suit have no

present right to disturb him. This was the view taken by Sadasiva Ayyar, J., in *Kumaraswami Pillai v. Pasupathia Pillai* (5). We agree with that view. Where the dispute is between parties to the suit, if it is just and convenient for the purpose of enforcing or carrying out the directions in the decree, we think a receiver can be appointed even where the party in possession is not liable to be removed. It is true that in the present case the Board of Control has no right to remove the trustees. Their petition was not for the purpose of removing the trustees but for the purpose of compelling them to carry out the duties according to the scheme.

This has been held to be *intra vires* in *Veeraraghavachariar v. Advocate-General of Madras* (6). The effect of the present order of the Subordinate Judge is not the removal of the trustee. Defendant 12 who is trustee of Annadhanam and Abishekam kattalais will continue to discharge his duties as trustee in all other matters untouched by this order. He will settle the budgets, obtain disbursements from the treasurer and incur the expenditure necessary for the carrying out of the kattalais. Only in the matter of collecting the income and remitting the cash collections to the treasurer a receiver is appointed to attend to these duties. As will appear lower down, this order must necessarily be of a temporary character and does not amount to a permanent dispossession of the trustee. In a suit brought by a mortgagee against a mortgagor for the purpose of obtaining the mortgage amount where the property belongs to a mutt and a sale is considered not desirable, a receiver was appointed for the purpose of collecting the income of the mortgage property and paying the amount due to the mortgagee: *Krishnamurthi Aiyar v. Krishnamurthi Aiyar* (7). A similar order was passed in *Mt. Sheoradni v. Munshi Lal* (8). We do not see therefore any objection to the appointment of a receiver in this case for the purpose of ensuring remittances of the collections from the properties of the two kattalais to the Board of Control. On the

(5) [1921] 61 I. C. 605.

(6) A. I. R. 1927 Mad. 1073=106 I. C. 665=51 Mad. 31 (F.B.).

(7) A. I. R. 1927 P. C. 139=101 I. C. 779=54 I. A. 248=50 Mad. 508 (P.C.).

(8) A. I. R. 1926 Pat. 542=97 I. C. 618=6 Pat. 154.

(3) A. I. R. 1930 Mad. 918=128 I. C. 515=54 Mad. 315.

(4) A. I. R. 1924 Mad. 869=75 I. C. 189=47 Mad. 139.

merits we do not see any reason why we should disturb the order of the Subordinate Judge having regard to the persistent conduct of the trustee in question.

As I have observed it is not desirable that a receiver should be appointed permanently. There should be some time limit; otherwise the Court will have perpetually to superintend the affairs of the kattalais. In the first instance we may limit the period to two years. If the Subordinate Judge is satisfied at the end of this period with the conduct of the trustees, or if the present trustee is removed, after his removal the receiver may be discharged, or the term of the receiver may be extended from time to time.

Subject to this modification the appeals are dismissed with costs.

P.R.S./B.V. *Appeals dismissed.*

A. I. R. 1932 Madras 196

STONE, J.

Official Assignee, Madras—Applicant.

v.

F. Byramshaw and another—Respondents.

Insolvency Petn. No. 157 of 1930, and Appln. No. 199 of 1931, Decided on 27th April 1931.

Transfer of Property Act (1882), Ss. 81 and 82—Equitable rule of rateable apportionment is applicable in India—This right is distinct from contribution and marshalling—It is right possessed by mortgagee against mortgagor and volunteers claiming under him, but not against third persons to have equity of redemption of two or more properties jointly mortgaged rateably apportioned as between puisne mortgagees—Principle does not apply where it conflicts with earlier mortgagee's right to elect out of which fund to realize his debt.

The equitable rule of apportionment—rateable apportionment—is in accordance with the principles of justice and fair dealing and is applicable in India. But it is distinct both from contribution and marshalling. It is a lesser right than the right of marshalling. It is the right to have the equity of redemption of two or more properties jointly mortgaged to say A rateably apportioned as between puisne mortgagees. It arises where the mortgagee under the joint mortgage exercises the right he has of paying off his mortgage debt out of any or more of the properties mortgaged to him and exercises that right by throwing the burden wholly or more than rateably on one property. The right however can only be invoked when it does not conflict with an earlier mortgagee's right to elect out of which fund to realize his debt and accordingly cannot be invoked, if such election has in fact been exercised, in the case where the second mortgagee as to one property is the same as the first mortgagee of that and another property. That is to say in principle the right of rateable apportionment is the right

possessed by a mortgagee against a mortgagor and volunteers claiming under the mortgagor, and it does not apply where in fact its operation would affect the interests of third parties other than volunteers: *A. I. R. 1928 All. 381; Bernes v. Raester*, 62 *E. R.* 944; *Smyth v. Toms*, (1918) 1 *Ir. R.* 338 and *A. I. R. 1928 Mad. 500, Rel. on.* [P 197 C 1; P 198 C 1, 2]

Vere Mockett, G. Rajagopalan and N. T. Shamanna, Advocate-General, S. Duraiswami Iyer and M. Subbaroya Ayyar—for Respondents.

Judgment.—This summons raises a point which is of importance, and so far as India is concerned, is a point of first impression, there being, so far as I am aware, no reported case dealing with the matter in question, although *Thanmul Sowcar v. Ramdas Reddiar* (1) is a case which glances at it. Having had the advantage of the argument by the Advocate-General assisted by Mr. Doraiswami Iyer, I assume that there are no cases in India as I am sure, had there been, they would have brought such cases to my attention.

The points raised are two: firstly does the doctrine of rateable apportionment apply in India in virtue of the provisions of the Transfer of Property Act, or otherwise; and secondly, if it does apply can it be applied in the circumstances of this case? This is one of those cases where the same mortgagor mortgages two properties (in this case "Bonaly" and "Maidstone," which can be related to A and B which I shall hereafter mention) both together and each separately. The question that falls to be considered is whether (the mortgagee, who is the mortgagee of both, having elected to take the mortgage debt out of one) a subsequent second mortgagee of that one can claim to have the debt of the first mortgagee, who is mortgagee in respect of both, rateably apportioned between the two properties in accordance with the values of those properties so as to leave the said second mortgagee a fair share of the equity of redemption of that property over which he has a mortgage. As to the first of the two questions above mentioned I am satisfied that there is a distinction on the one hand between contribution and rateable apportionment, and on the other between rateable apportionment and marshalling. Contribution is a right which is given to a mortgagor; marshalling is a right that is given to a mort-

(1) *A. I. R. 1928 Mad. 500=110 I. C. 54=51 Mad. 648.*

gagee. Contribution arises, where the owner of one of several mortgaged estates pays off the mortgage debt and the right that he has is a right to call upon the owners of the other of the estates mortgaged to secure the debt paid off to contribute. This, in India, is a right which finds expression in S. 82, T. P. Act. It obviously has no application here and I only mention it because in cases here and in Ireland the right of contribution and the right of apportionment appear to have been confused to some extent. Marshalling is a right which a puisne mortgagee has—and it also applies in cases other than mortgage cases—as against the mortgagor or volunteers claiming under the mortgagor to so use the equity of redemption as to do equity to the puisne mortgagee by substituting for the security another security if the security has been in whole or in part rendered unavailable by an earlier mortgagee, being a mortgagee of both securities, choosing to realize his debt out of the security of which the puisne mortgagee is the mortgagee to the advantage of the other security of which no one is a puisne mortgagee. This right is not available if there is a puisne mortgagee of the other security, for it is only available against the mortgagor and volunteers, that is, it does not apply where the rights of another mortgagee are involved. This right in India finds expression in S. 81, T. P. Act. It is conceded that the right, as so expressed, does not here arise. The right of rateable contribution is distinct from both, and is not the subject of any particular section of the Transfer of Property Act.

It is clear that rules of equity have no application where there are clear rules of statute: vide *Gopilal v. Abul Hamid* (2). Where however there are no express statutory provisions and a rule of equity has been developed by the Chancery Courts in England, which is in accordance with good conscience and fair dealing, then in my opinion those rules have application in India. I am of opinion that the equitable rule of apportionment—rateable apportionment—is in accordance with the principles of justice and fair dealing and though not the subject of any special statutory provision, is not excluded by any statutory provision and is accordingly applicable in India. This right is one which is posses-

sed by a mortgagee against the mortgagor. It is a lesser right than the right of marshalling. It is the right to have the equity of redemption of two or more properties jointly mortgaged to A rateably apportioned as between puisne mortgagees. It arises where the mortgagee under joint mortgage exercises the right he unquestionably has of paying off his mortgage debt out of any one or more of the properties mortgaged to him and exercises that right by throwing the burden wholly (or more than rateably) on one property. The reason of the thing is, in my opinion, as follows: Let properties A and B of equal value be mortgaged to X to secure an advance equal to the value of either and let a second mortgage on A be taken by Y and a second mortgage on B be taken by Z. In these circumstances X may pay himself how he will, and may take the whole of A leaving B unencumbered. Thus, as between Y and Z, X's free election may work to the disadvantage of Y or Z. But in equity, Y and Z, as against the mortgagor, are equal in right. Y and Z are both second mortgagees.

It is not therefore fair that the chance of the exercise of election by X should advantage the mortgagor or work to the disadvantage of either mortgagee. Therefore when considering the relative rights of the mortgagor on the one hand and of the mortgagees Y and Z on the other, those mortgagees have the right against the mortgagor and volunteers, but subject to the rights of others to be put in that position which they would have held had X elected to do this, namely, take his debt out of the two properties A and B in the proportion of the values of the properties. Those 'values' are the values of the equity of redemption at the time when the mortgagee electing is free to realize. In this case because Bonaly had over it a mortgage earlier in time than the mortgage possessed by the gentleman that I have referred to as X, that is to say, Byramshaw, in this case when considering the value of Bonaly from the point of view of the election on the part of Mr. Byramshaw, one does not take it at the sale value of Rs. 40,000, but one takes it subject to an earlier mortgage which existed. That is if X is not the first mortgagee but if a still earlier mortgagee has to be provided for before X can pay himself out, one considers the value of the

(2) A. I. R. 1928 All. 381=116 I. C. 90.

equity of redemption of *A* and *B*. If such earlier mortgagee is a mortgagee of both, that sum is worked out by applying the principle of rateable apportionment in his case also, and in that case the sum would work out the same as though there were no such earlier mortgagee. But if the earlier mortgagee had the mortgage on *A* only, then the value of *A* at the time *X* pays himself out, for the purpose of rateable apportionment calculation when we come to *Y* and *Z* would be the realized value of *A* less the mortgage of the earlier encumbrances as in the case I have just put. The above proposition, I believe, will be found to be in accordance with *Barnes v. Racster* (3), *Smyth v. Toms* (4), *Flint v. Howard* (5) and *Thanmul Sowcar v. Ramdeo Reddiar* (6), except that I demur to the suggestion made in certain of the above cases that the apportionment is based upon contribution and I do so for the reasons given above.

However in this case there is a further difficulty caused by the factor that *X* and *Z* are the same. This being so, how can *Z*'s undoubted right to election be reconciled with the doctrine of apportionment? Clearly in the case I put, *X* has a right to throw all his mortgage debt on to *A* leaving *B* free for his second mortgage. But, if as between *Y* and *Z*, the mortgagor is made to treat the position as though *X* has not elected, the effect upon *X* (being the same person as *Z*) is to take away *X*'s right to elect. I am accordingly of the opinion that the right of rateable apportionment can only be invoked when it does not conflict with an earlier mortgagee's right to elect out of which fund to realize his debt and accordingly cannot be invoked where such election has in fact been exercised if the second mortgagee as to one property is the same person as the first mortgagee of that and another property. That is to say, in principle, the right of rateable apportionment is the right possessed by a mortgagee against a mortgagor and volunteers claiming under the mortgagor, as in the case of marshalling, and it does not apply where in fact its operation would affect the interests of third parties other than volunteers. In this case it certainly would affect the right

of a third party, namely Byramshaw, and it is no more applicable in the circumstances of this case than is the doctrine of marshalling. Accordingly I negative the right in the present case though I am of opinion that he is not excluded by the fact that the Transfer of Property Act does not specifically mention this right. The sum in question will be distributed in accordance with the above. Taxed costs of the application, on the original side scale, for two counsel, the amount of costs to be added to the mortgage debt.

P.R.S./P.N.

Order accordingly.

A. I. R. 1932 Madras 198

CURGENVEN AND CORNISH, JJ.

S. Ramakrishna Pillai — Plaintiff—Appellant.

v.

Tirunarayana Pillai and others—Defendants—Respondents.

Appeal No. 268 of 1925, Decided on 25th February 1931, from decree of Sub-Judge, Mayavaram, in Original Suit No. 8 of 1917.

(a) Evidence Act (1872), S. 115—*A* dying—*D* as *A*'s son's nearest reversioner taking possession of estate—*P* contending that his minor son *K* was adopted by *A*—Agreement between *D* and *P* in his personal capacity and as minor's guardian by which *K* received portion of estate and rest went to *D*—*P* also admitting *D*'s claim to estate as next reversioner and agreeing not to set up any rival claim—After 15 years *P* suing as *A*'s son's sister's son and claiming estate as against *D*—*P* held to be estopped from putting forth such claim owing to his previous agreement.

After the death of *A*, the mother of the last male holder, *D* as *A*'s son's next reversioner took possession of the estate, whereon *P* contended that his minor son *K* had been adopted by *A* before her death. An agreement was drawn up between *P* and *D* to the effect that *K* was to receive some portion of the estate and that the rest was to go to *D*. *P* had become a party to the agreement in his personal capacity and as the minor's guardian. He therein admitted that *D* was the next reversioner, that *D* had not consented to the adoption of *K* by *A* and that neither *P* nor *K* would set up rival claims as against *D*. Relying on this indenture *D* parted some of his property in dispute to *K*. Then after 15 years *P* as *A*'s son's sister's son sued *D* on which *D* raised the plea of estoppel.

Held: that in the above circumstances *P*'s conduct in entering into the said agreement did estop him from raising such claim and that a fortiori it had constituted a clear and unqualified admission on his own behalf of *D*'s title.

[P 202 C 1]

(b) Civil P. C. (1908), S. 11—Dispute between *G* and *D* as to validity of adoption of each other by two first cousins—Both adoptions held valid—Subsequent suit between *P* and *D*—Issues as regards *D*'s adoption and

(3) 62 E. R. 944.

(4) [1918] 1 Ir. R. 338.

(5) [1893] 2 Ch. 54=62 L. J. Ch. 804=2 R. 386=68 L. T. 390.

(6) A. I. R. 1928 Mad. 500=110 I. C. 54=51 Mad. 648.

as to which of them was next reversioner—Part of suit property belonging to *G*—*P* claiming as *G*'s successor-in-interest—Question as to validity of *D*'s adoption held not barred by *res judicata*.

In a previous suit, there was a dispute between *G* and *D* regarding the validity of adoption of each by their respective adoptive fathers who were first cousins. There the Court held that adoptions were valid. In a subsequent suit between *P* and *D* the issues regarding the validity of *D*'s adoption and as to which of them was the next reversioner were raised. A part of the suit property originally belonged to *G* and *P* was suing as *B*'s sister's son, while *B* had inherited *G*'s property:

Held: that in the above circumstances the point that some of the suit property was traceable to *G* was wholly irrelevant and that the question as to the fact of *D*'s adoption could not be barred by *res judicata*: 8 *Mad.* 219 (*P. C.*), *Dist.*; *A. I. R.* 1930 *Cal.* 47; 30 *Cal.* 556 (*P. C.*) and 6 *Mad.* 43, *Ref.* [P 203 C 2]

(c) Evidence Act (1872), S. 32 (5)—Statements as to adoption of party in subsequent suit made in previous suits wherein question of adoption directly in issue—Such statements are not admissible in subsequent suit under S. 32 (5).

Where the statements regarding the fact of adoption of the party in the present suit were made in previous suits in which the question of adoption was directly in issue, such statements should not be admitted in evidence in the present suit under sub-S. (5), S. 32, as they were not made before the question in dispute was raised. [P 204 C 1]

(d) Evidence Act (1872), S. 33—Phrase "representative-in-interest" in S. 33 is not always synonymous with "person claiming under" in Civil P. C. (1908), S. 11.

The phrase "representative-in-interest" in S. 33 is not for all purposes synonymous with the expression "the person claiming under" in S. 11, Civil P. C.; for instance, cases may be cited in which the former expression has been deemed to apply to the several members of a class. [P 204 C 1]

(e) Evidence Act (1872), S. 101—Adoption of *D* acquiesced by members in adopting family for over 50 years, *P* one of such members challenging it—*P* has to disprove adoption.

Where the fact of adoption of *D* has been acquiesced by the members of the adopting family, though sometimes against their interests, for a period of over 50 years, and after which period *P*, one of the members of the family challenges it to suit his own selfish motives after all his attempts to secure a part of the estate going to the adopted son in his reversionary right are frustrated, the burden lies on *P* to disprove *D*'s adoption because the case of a Hindu, long recognized as an adopted son, raises a very strong presumption in favour of the validity of his adoption, arising from the possibility or the loss of his rights in his own family by being adopted in another family: 14 *M. I. A.* 67 (*P. C.*), *Rel. on.*; *A. I. R.* 1925 *P. C.* 201; 42 *All.* 382 and *A. I. R.* 1928 *All.* 176, *Ref.* [P 205 C 1]

(f) Words and Phrases—"Dayadi" means "agnatic heir."

The word "dayadi" in Hindu law is equivalent to "agnatic heir:" 1 *Mad.* 69 (*P. C.*), *Ref.* [P 205 C 2]

(g) Evidence Act (1872), S. 32—Inam inquiry—Statement as to pedigree put in but signed by pleader and not by persons supposed to make it—Form of statement showing it to originate with members holding inam and as made in presence of proper authorities—Those persons members of family of parties in subsequent suit—Such statement is admissible in subsequent suit to show pedigree of parties—Name of common ancestor omitted, but branches clear—Still pedigree is useful to show relation of parties.

A statement, containing the genealogical table relating to the parties in a suit had been put in during an inam inquiry by some of the members of the family of the parties in the suit. That statement was not signed by any of those persons, but was signed by their pleader as made on their behalf, and with a certificate that the statement was true. The form and contents of the statements showed that it purported to originate with the members for whom the pleader signed, and as a statement in an inam inquiry by the holders of the inam, and that it was attested by two karnams and received by a proper officer. The name of the common ancestor was not to be found, but the branches originating from him were clear, including the names of the parties in the suit. [P 206 C 1]

Held: that such a statement in the above circumstances should be held to be duly authorized and as made by those persons on whose behalf it was signed by their pleader. Therefore it was admissible in evidence under S. 32, to show the pedigree of the parties in the present suit. Although the name of the common ancestor was missing, yet as the branches were clear, the omission of common ancestor was not material: 12 *Cal.* 219 (*P. C.*); 25 *All.* 143 (*P. C.*); 31 *Cal.* 871 (*P. C.*) and *A. I. R.* 1917 *Mad.* 844, *Ref.* [P 206 C 2]

(h) Evidence Act (1872), S. 35—Statutory duty on officer to investigate and report facts—Report of facts is official record within S. 35.

It must always be a question of drawing a line between records and correspondence which do, and those which do not, fall within the scope of S. 35. But where there is a statutory duty laid upon public officers to investigate and report facts, a report of the facts elicited by their investigation is an official record within the meaning of S. 35. [P 207 C 1]

(i) Evidence Act (1872), S. 32 (5)—For proving relationship, statements of deceased relatives, servants and dependants of family are admissible.

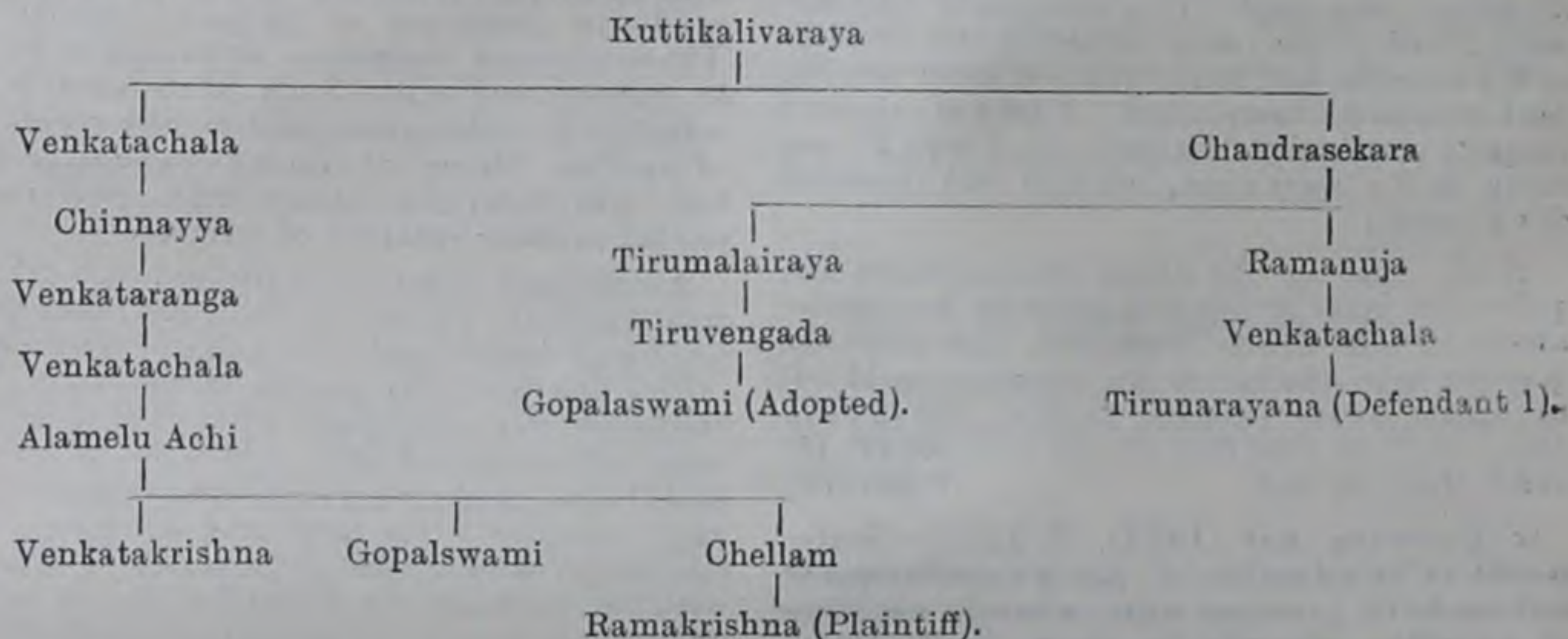
In India the rule governing cases under S. 32 (5) is wider than in England, where it applies only to blood relations and their consorts. In India for the purpose of proving relationship statements of deceased relatives, servants, and dependants of the family are admissible, and in every instance, it must be a question of fact as to whether the person who made the statement had special means of knowledge: 23 *All.* 37 (*P. C.*), *Foll.* [P 207 C 1, 2]

T. R. Venkatarama Sastriar, T. S. Ramaswami Ayyar, M. S. Vaidyanatha Ayyar and V. Sundaram Ayyar—for Appellant.

S. Srinivasa Ayyangar, A. C. Sampath Ayyangar, N. Somasundram and M. Krishna Bharathi—for Respondents.

Curgenven, J.—The main question

which this appeal raises is whether the plaintiff or defendant 1 is the nearest reversionary heir to the estate of one Venkatakrishna Pillai who died on 24th October 1899 leaving considerable property in the Tanjore District. The following genealogical table illustrates the rival claim:



It will be seen that the plaintiff Ramakrishna Pillai, is the son of Venkatakrishna's sister, Chellam, while defendant 1 claims to be the adopted son of one Venkatachala Pillai shown as an agnate belonging to another branch of the family. The left and right hand branches are referred to in the evidence as the Kannankulam and Kappayam branches respectively. The fact of this adoption is disputed and it is further disputed that the adoptive father was related to the last male holder in the manner shown in the table. The learned Subordinate Judge has upheld defendant 1's claim upon each of these points and the plaintiff appeals.

On Venkatakrishna's death without issue the estate devolved for her life upon his mother, Alamelu Achi, who died on 7th April 1905. Thereupon defendant 1 took possession of the property claiming as the next reversionary heir. At the time, the plaintiff set up, not his own right, but a claim that his son Krishna-swami had been adopted by Alamelu Achi just prior to her death. This claim he succeeded in compounding with defendant 1 by means of a deed of indenture under which the plaintiff's son received a certain amount of the property in exchange for the withdrawal of this claim. This document was executed in May 1905 and it was not until 1917 that the plaintiff instituted the present suit. The issue with regard to defendant 1's reversionary right is attended by two preliminary objections

to the plaintiff's right to raise it; it is contended, in the first place, that he is precluded by reason of his subscription to the indenture referred to, and secondly, it is said to be barred by *res judicata*.

The question of estoppel arises out of the following facts: In January 1905, Alamelu Achi addressed a letter, Ex. X, to defendant 1 expressing a strong desire to adopt, and inviting him to come and discuss the matter. It is clear that his consent was sought in the belief that he had a reversionary interest in the estate, a belief which, as the evidence will show, had been widely recognized by members of the family for a long period. Defendant 1 wrote back discouraging the idea but professing himself willing to discuss it. It is deserving of note that on getting this reply Alamelu Achi got the plaintiff, who was largely responsible for the management of her affairs, to consult Sir V. Bashyam Ayyangar, their legal adviser: Exs. 36 and 36 (a). A further letter was then sent to defendant 1, Alamelu Achi explaining that she was desirous of consulting him as he was the most influential among the relatives.

In reply, defendant 1 attributed her reference to him to his being the nearest dayadi and therefore of course the first person whose consent should be obtained, and in Alamelu Achi's next letter, Ex. 11-a, she acknowledges that she wanted to obtain his permission as a gnat. With this letter, dated 10th March 1905,

the correspondence ends. As has been said, Alamelu Achi died on 7th April and on that very day the plaintiff telegraphed to defendant 1 alleging that she had executed a will, and adopted his son Krishnaswami. He also sent telegrams to the same purport to two other persons as remoter dayadis.

The next day, defendant 1 wired back repudiating the will and the adoption as false and invalid, and the other two reversioners replied in the same sense. Then, on 12th April, defendant 1, alluding to the circumstances of this claim, filed a petition in the District Court of Tanjore applying that a curator should be appointed to take charge of all the immovable and moveable properties of the estate. Next day however an agreement was come to between the plaintiff and defendant 1 and embodied in a document, Ex. A. It recites the rival claims, deprecates resort to litigation and declares that the parties have entered into a compromise according to which, the minor Krishnaswami was to get certain of the lands and moveables and defendant 1 the remainder. This was signed by the plaintiff as guardian of the son and by defendant 1. It was agreed at the same time that the necessary documents should be executed within a month, and pursuant to this deed of indenture, Ex. 1 was signed on 11th May 1905. This deed was executed by defendant 1, described as the adopted son of Venkatachala Pillai, of the first part by the plaintiff acting as father and guardian of the minor Krishnaswami, of the second part and by the plaintiff in his personal capacity of the third part.

After alluding to Alamelu Achi's succession and death it declares that defendant 1 became entitled to the estate and had taken possession of it as reversionary heir of Venkatakrishna. It then refers to the contention raised by the plaintiff, as guardian, that Alamelu Achi had adopted his son, following this by an admission made by the plaintiff in both capacities that no authority had been given by defendant 1 or by the remoter reversioners for this adoption, with the consequence that defendant 1 was alone entitled to all the properties of the deceased. Out of regard and affection for the minor however and his close relationship to the deceased Alamelu Achi, defendant 1 conveyed to him the properties specified in Sch. 1 to the indenture absolutely, but

subject to the condition that, if the claim of adoption were again set up, the deed should stand revoked. Now it is claimed that this document operates against the plaintiff in three separate ways by estoppel, as a composition, and as an admission.

It will be seen that it is primarily a settlement of the competing claims of defendant 1 and of the minor Krishnaswami as alleged adopted son of Alamelu Achi. It has been argued that, viewed in this light, the plaintiff is not personally bound by its terms as he subscribed to them, not in his personal capacity, but as guardian of his son; and that the only object of the document was to put an end to the son's claim as Alamelu Achi's adopted son, so that no renunciation of any claim which the plaintiff may himself have had as reversioner is either expressly or impliedly made. That the document was not executed by the plaintiff purely in a representative capacity is clear from the circumstance that besides being a party as guardian he was made a party of the third part in his personal capacity. This cannot have been done simply because he became a trustee of a certain charitable endowment, because the other trustee, K. Chithambaranatha Mudaliar, was not made a party, and only signed the document as a witness.

It seems clear therefore that he was added in his personal capacity in order that the recitals in the document should in that capacity bind him. The arrangement was in fact for the plaintiff's own benefit, as deposed by Chidambaranatha Mudaliar himself, a very respectable witness. These recitals include an unqualified statement that defendant 1 had become entitled to Venkatakrishna's property as reversionary heir, and since it was open to the plaintiff at that time to set up his own competing title and he not only did not do so, but made this declaration, the conclusion must be, I think, that he thereby admitted that defendant 1's title as reversioner was superior to his own. I think that this declaration can only be taken as an assurance to defendant 1 that if Krishnaswami's claim was out of the way, there was, so far as the signatories to the document were concerned, no other competing claim to his—that he was Venkatakrishna's reversionary heir. Whether or not such an admission would amount to an estoppel must depend upon the view taken of the course which de-

fendant 1 was led to adopt in consideration of it.

The learned Subordinate Judge finds an analogy in the circumstances of the case reported as *Sarat Chunder Dey v. Gopal Chunder Laha* (1), but there is this difference, that the mortgagee in that case was induced by the representations made, to advance money which formed no portion of the property in dispute; whereas here it was a portion of the disputed property that defendant 1 conveyed to the minor. If however he so conveyed it on the understanding that so far as the plaintiff and his son were concerned his title would henceforward be undisputed, I am not clear that the plaintiff is any the less estopped by this circumstance. It is pretty evident, I think, that if the plaintiff had endeavoured to put this transaction through, while expressly reserving his own right to dispute defendant 1's position as the nearest reversioner and to advance his own claim as sister's son, defendant 1 would never have parted with the property. If that be granted, then I think the plaintiff is clearly estopped from setting up his claim. No case has been cited to us directly in point and I only refer to the Privy Council case, *Raja of Deo v. Abdullah* (2), where it was held that a party may be caused to change his position even by being the recipient of a gift which carried with it the ordinary liabilities of immovable property in order to show how far the doctrine extends. I consider that the plaintiff's conduct in entering into this agreement did estop him from raising this claim and that a fortiori it constituted a clear and unqualified admission on his own behalf of defendant 1's title. As to the remaining aspect, I do not think that Ex. I can be construed as a composition of the claim.

To understand the plea of res judicata certain facts, which will be of use in dealing later with the merits of the claim, require to be known. The table given above shows one Thiruvengkata as first cousin to Venkatachala, defendant 1's alleged adoptive father. Gopalaswami, Venkatakrishna's natural brother, appears also as Thiruvengkata's adopted son. The litigation which gives rise to this plea is between this Gopalaswami and defendant 1,

each questioning the other's adoption. On 1st November 1873 Thiruvengkata executed a will. On 29th July 1879 he died. The will made certain dispositions in favour of both Gopalaswami and defendant 1, and it will become necessary later on to consider its terms in some detail. As soon as the testator died, the question of the revenue registry of his properties arose and the records relating to these proceedings show that the claims of the rival candidates were sometimes asserted and sometimes denied. The first civil litigation took the form of an interpleader suit filed against the rival claimant by a mortgagor to Thiruvengkata anxious to redeem his property. In this it was found that the adoption of each was true and valid.

Shortly after this came to an end, Thiruvengkata's widow died and Gopalaswami on 29th May 1884 filed a suit against defendant 1 and others (Original Suit No. 30 of 1884, Subordinate Judge's Court, Kumbakonam), which, it is claimed renders the question of defendant 1's adoption res judicata as between the present parties. The Subordinate Judge found that neither adoption is true, but both those findings were reversed on appeal. As regards defendant 1's claim the High Court observed that the plaintiff, that is, Gopalaswami, had withdrawn his contest, and both adoptions were declared well proved, and the case was then remanded for the trial of the other issues, and when the suit went back to the trial Court both parties filed a statement, Ex. 32 (g), admitting the validity of Thiruvengkata's will and agreeing to take the properties in accordance with its terms, and a decree was passed in conformity with this compromise. In August 1893 Gopalaswami died, and Venkatakrishna, the last male holder in the present case, inherited his property under his will, dated 7th August 1893. It is this property, with some others not derived from Gopalaswami, that is the subject-matter of the present dispute. So far as the latter property is concerned the doctrine of res judicata can have no application, and it is therefore necessary, however that matter may be decided, to go into the merits of defendant 1's claim as nearest reversioner. For this reason and also because we propose to uphold that claim upon its merits, it is not essential for the due disposal of this suit that a finding should be recorded upon

(1) [1893] 20 Cal. 296=19 I. A. 203=6 Sar. 224 (P.C.).

(2) A. I. R. 1918 P. C. 35=45 I. C. 770=45 I. A. 97=45 Cal. 909 (P.C.).

this question of *res judicata*. I will however briefly set down my reasons for the conclusion that no such defence arises in the circumstances of the present case.

The argument in support of the plea depends primarily upon the circumstance that the property in dispute derives from Gopalaswami, so that it is said that, while defendant 1 is a party common both to the earlier and the later suit, the plaintiff claims under the other party within the meaning of S. 11, Civil P. C. Of course defendant 1, equally with the plaintiff, claims under him as reversioner, but in view of his own participation in the previous suit this circumstance, it is said, may be disregarded and does not bring the case into line with such decisions as *Vythilinga v. Vijayathammal* (3) and *Asghar Raza Khan v. Mahomed Mehdi Hossein Khan* (4). It appears to me that this is an extremely doubtful proposition, and if the question depends, as it must do, upon the devolution of Gopalaswami's property, I think that the principle of those decisions does apply, and that it is as a claimant to Venkatakrishna's property that defendant 1's position must be regarded. Then it is no doubt true that, as between Gopalaswami and defendant 1, the effect of the adjudication in Original Suit No. 30 of 1884 was to set at rest the question, irrespective of the property involved in the dispute. There is authority for this in *Pittapur Raja v. Buchi Sitayya* (5) and *Abdul Gani v. Nabendrakishore Ray* (6). The matter in issue between them, the fact of adoption, had been tried and finally decided. The further question, how far Gopalaswami's disability attached to the holder of or claimant to property traceable to him, is of far greater obscurity. Mr. Srinivasa Ayyangar would ask us to hold that the plaintiff is thus barred by virtue of the source of the property to which he lays claim, but the case which he cites, *Pittapur Raja v. Buchi Sitayya* (5), is certainly no authority for so wide a proposition. In that case the son stood in the shoes of his father in a manner to which the relation between Gopalaswami and the plaintiff furnishes no parallel.

The proposition may be reduced to an absurdity by supposing that Gopalaswami had disposed of his property by a number of gifts and bequests, would each recipient be ipso facto debarred from questioning defendant 1's adoption? It appears to me that the circumstance that some of the property in dispute belonged to Gopalaswami is a wholly irrelevant consideration. His title to that property involved the question not of defendant 1's adoption but of his own. I think further that it is merely fortuitous that some of the property to which, as reversioner to Venkatakrishna, the plaintiff lays claim, should have descended from Gopalaswami. I can only add that no principle or line of reasoning intelligible to me has been advanced which would lead me to hold that the earlier adjudication now bars the trial of the fact of adoption. The learned Subordinate Judge has summarized in para. 49 of his judgment the various heads of proof that the adoption was made. They consist of : (a) the terms of Thiruvankata's will, (b) evidence, direct and indirect, that the ceremony of adoption was performed, and (c) evidence that subsequently defendant 1 behaved and was accepted by members of the family as the adopted son. (His Lordship here proceeds to consider the evidence afforded by the terms of the will and the other evidence.) Those terms would therefore in my view, afford very strong support to other evidence that the adoption was in fact made.

The oral evidence relating to the performance of the ceremony of adoption consists in the testimony of three witnesses examined at the trial and of the depositions of a number of other witnesses, not now available, who were examined in the interpleader suit and in Original Suit No. 30 of 1884. It cannot be said that defendant 1 is now in a position to call witnesses qualified to give any very convincing evidence upon this point. The three witnesses whom he examines are himself (D. W. 1), one Muthiah Pillai (D. W. 4) and his Karyasthan Appuswami Ayyar (D. W. 13). To show the handicap under which defendant 1 labours in producing oral evidence at this distance of time, it may be observed that the ages of the two witnesses other than himself are given respectively as 73 and 69 years. The learned Subordinate Judge has given some grounds in para. 63 of his judgment for not attaching very much weight to

(3) [1883] 6 Mad. 43.

(4) [1903] 30 Cal. 556=30 I. A. 71=8 Sar. 439 (P.C.).

(5) [1884] 8 Mad. 219=12 I. A. 16=4 Sar. 598 (P.C.).

(6) A. I. R. 1930 Cal. 47=124 I. C. 161=57 Cal. 258.

this evidence, and I do not therefore wish to base my decision in any material degree upon it, although there are a great many other considerations to suggest that it is true.

The learned Subordinate Judge has admitted in evidence the depositions of as many as 24 other witnesses, three of whom at least he thinks are fully deserving of credit, considered even on their own merits, and apart from such corroboration as is furnished by the will and other circumstances. It is for consideration whether these statements are admissible. They were made in suits in which the question of adoption was directly in issue and cannot therefore be admitted under sub-S. (5), S. 32, Evidence Act, as they were not made before the question in dispute was raised. It is claimed that they are relevant under S. 33 of the Act, as evidence given in a prior judicial proceeding. That section contains three provisos the first of which is that the proceeding is between the same parties or their representatives-in-interest. Defendant 1 having been common to the two suits, the question is whether the plaintiff here is a representative-in-interest of Gopalaswami in the two former suits. It may be true, as Mr. Srinivasa Ayyangar contends, that the phrase "representative-in-interest" is not for all purposes synonymous with the expression "the person claiming under" in S. 11, Civil P. C., for instance, cases may be cited in which the former expression has been deemed to apply to the several members of a class. But I think that here, unless the plaintiff can be said to be claiming under Gopalaswami within the meaning of S. 11, Civil P. C., in no other way can he be said to be his representative-in-interest. We must therefore apply the same tests as were appropriate in deciding the question of *res judicata* and, as I have said in dealing with that question, I am unable to see by what line of reasoning the plaintiff can be held to be Gopalaswami's representative so far as the issue of defendant 1's adoption is concerned. I must hold accordingly that these statements are inadmissible. (Here his Lordship discussed the evidence as to adoption and held that the documentary evidence corroborated the oral evidence as to the recognition of defendant 1's status as an adopted son.) Enough has I think been set down to show that on many occasions and over a

long period of time defendant 1's adoption has been admitted by members of the family some at least of whom were interested to deny it. I cannot interpret Thiruvengkata's own treatment of the boy as otherwise than an acknowledgment of the fact. Even his widow Alamelu, although she disputed her own husband's adoption of Gopalaswami, and might have been expected to get rid of defendant 1's claims in the same manner, stopped short of this. Gopalaswami himself seems only to have challenged the adoption because his own was challenged, and admitted it readily enough when his own was established. Then in turn we find Venkatakrishna and his widow making the same admission. Lastly, but very notably, there is the conduct of the plaintiff himself. From the time of Venkatakrishna's death he appears to have cast covetous eyes upon the property, becoming a party to the proposal that the widow should renounce her rights, and when that broke down owing, according to defendant 1, to his excessive demands, setting up the palpably false claim of his own son's adoption. When this too failed, and after a delay not satisfactorily accounted for, he files the present suit. The main issues in that suit is the truth of an occurrence said to have taken place in 1873, more than fifty years before it was instituted. Defendant 1, now in his seventieth year, was then a child of eleven. It is sought to make much of certain early doubts cast upon his status.

I have referred, as some explanation of those to the motives which are likely to have actuated Thiruvengkata in wording his will as he did, and to the dispute with Gopalaswami. Since that dispute ended a long period has elapsed, and no further challenge was forthcoming, although some occasions arose for it, until the plaintiff's very belated action. In view of all that has taken place, it may almost be said that it lies upon the plaintiff himself to disprove the adoption, even were we to disregard such oral evidence as still remains available. To hold otherwise would lead to the anomaly that the older the adoption set up the more vulnerable becomes the occupant's position. This view is well enough supported by authority. In *Rajendra Nath Heidar v. Jogendra Nath Banerjee* (7), the Judicial Committee had

(7) [1870] 14 M. I. A. 67 = 7 Beng. L. R. 216 = 15 W. R. 41 = 2 Sar. 666 (P. C.).

to deal with the validity of a will under which an adoption was made and acquiesced in by the family for twenty-seven years, when a suit was brought by one of the testator's heirs claiming the estate on the ground that the adoption was invalid.

Their Lordships held that, although the defendant was bound to prove his title as adopted son, every allowance for the absence of evidence to prove such fact was to be favourably entertained, and that the case was analogous to that in which the legitimacy of a person in possession had been acquiesced in for a considerable time, and afterwards impeached by a party who had the right to question the legitimacy, where the defendant, in order to defend his status, is allowed to invoke against the claimant every presumption which arises from long recognition of his legitimacy by members of his family, and that the case of a Hindu, long recognized as an adopted son, raised even a stronger presumption in favour of the validity of his adoption, arising from the possibility of the loss of his rights in his own family by being adopted in another family. In another case before the Privy Council, *Venkata Seetharama Chandra Rao v. Kanchamarthi Raju* (8), the authority of a widow to make an adoption which was in fact made forty-two years before suit was questioned by a reversionary heir, and their Lordships, after referring to a variety of considerations, the transfer of the adopted son from his natural to his adopted home, his recognition, after inquiry, by the legal authorities, proceedings in which the plaintiff had acknowledged the right, the dilatoriness of the plaintiff in preferring his claim, expressed the view that the burden resting upon a litigant who disputes such a claim is indeed of the heaviest order. Two cases dealt with by the High Court of Allahabad on the same lines are *Prem Devi v. Shambhu Nath* (9) and *Chhote Lal v. Chandra Bhan* (10). In the present case, together with a little direct evidence still available, it has been shown that in numerous transactions and over a long period of time defendant 1 acted and was treated as an adopted son, his position not even being challenged by

the plaintiff himself until all other means of securing some of the property had been tried; I find it very hard to believe that the plaintiff can have any faith in the truth of his own claim. I find on this issue against him.

The question next arising is whether the Kannakulam and the Kappayan branches of the family are agnatically related as shown in the tree. The evidence consists of: (1) proof that members of each branch have been described and treated as dayadis by members of the other, and (2) proof of the relationship actually alleged.

The expression "dayadi" is in Ghose's Hindu Law explained as being equivalent to "agnatic heir," and in this sense it has been construed in the Privy Council judgment in *Sri Virada Pratapa Raghunada Deo v. Sri Broze Kishore Patta Deo* (11). That members of two branches shown in the tree are so related has been affirmed so frequently by one or the other of them as to leave the matter in no doubt whatever. (After discussing the evidence as to the plaintiff's case that defendant 1 may not be agnatically related as alleged by him proceeded as follows:) The record comprises three pedigrees all showing the same relationship and, except for one possible inaccuracy, agreeing as to the names of the connecting links. The first of these is contained in Ex. 24, a statement put in during the inam inquiry of 1865 by (1) Venkatachala Pillai, the father of Venkatakrishna, (2) Thiruvenkata Pillai, and (3) Venkatachalam Pillai, the adoptive father of defendant 1. This statement is not signed by these persons or by any of them, but by a vakil on their behalf under a certificate that the matters set out in the statement and the genealogical tree are true. It is contended that because it is not signed by the persons whose statements it purports to be, it is not admissible under S. 32 (5), Evidence Act. Two cases have been cited before us as authority of this position. The case in *Sangram Singh v. Rajan Bahi* (12) related to the deposition given in Court by a muktyar, and that being so it was only the personal knowledge of the deponent which could render his state-

(8) A. I. R. 1925 P. C. 201=89 I. C. 817 (P.C.).

(9) [1920] 42 All. 382.

(10) A. I. R. 1923 All. 176=80 I. C. 1041=45 All. 59.

(11) [1876] 1 Mad. 69=3 I. A. 154=3 Sar. 583 (P. C.).

(12) [1886] 12 Cal. 219=12 I. A. 183=4 Sar. 676 (P.C.).

ment admissible, since the statement must be that of a person having "special means of knowledge." Their Lordships make this clear when they say:

"It appears to their Lordships therefore on the two grounds first, that he was not shown to have special knowledge, and secondly, that he did not pretend to speak from his knowledge at all, that this deposition was not admissible."

The statement could not be taken to be that of his clients, since no client can authorize a representative to depose in Court as from his own lips. The second case, *Jagatpal Singh v. Jageshar Baksh Singh* (13), related to a genealogical table filed on behalf of the client in some prior claim. The admissibility of this evidence was found to be open to the fatal objection that it was in no way brought home to the client except as being an exhibit binding on him for the purpose of that suit:

"His relation to the document is therefore something entirely different from the personal knowledge and belief which must be found or presumed in any statement of a deceased person which is admissible in evidence. For aught that appears, the genealogical table in question might never have been seen or heard of by Gurdatt personally, but have been entirely the work of his pleader."

I do not think that the circumstances of that case also conform to those of the present. There can be no doubt from the form and contents of the statement before us that it purports to originate with the members for whom the vakil signed, as a statement in an inam inquiry by the holders of the inams. It is attested by two karnams, was received by an officer whose duty it was to ensure that information was correctly obtained from the proper parties and it appears to me that the circumstances in which it originated justify the presumption that it was duly authorized and is in effect, as it is entitled, a statement put in by the three persons named. In *Rani Srimati v. Khagendra Narayana Singh* (14) the question arose whether a statement in a petition for the appointment of a guardian was admissible in evidence, the argument (on p. 880) being that no proof that the statement was authorized by those in whose name the petition was presented had been furnished. Their Lordships however held that the statements in the petition must be regarded as the state-

ments of the petitioners if the document was worth anything. Another instance of a petition filed on behalf of a party but not bearing his signature is furnished by *Chandreshwar Prasad Narain Singh v. Bisheswar Pratap Narain Singh* (15) and evidence contained in it was deemed admissible under S. 32, Evidence Act. I do not think that either of the two cases relied upon for the appellant is authority for the rejection of a statement such as the one under consideration. It is further objected that from the genealogical table the name of the common ancestor is missing, but inasmuch as the two brothers Venkatachala Pillai and Chandrasekhara Pillai, from whom the two branches are derived are shown as brothers, I follow *Jagannadham v. Venkatasubba Rao* (16) in holding this to be no objection in law to accepting the pedigree as proof of the relationship.

On the death of Thiruvenkata in 1879 the Collector submitted a report to the Board of Revenue on the question whether the estate should be taken over by the Court of Wards, and illustrated his statement of the facts by a genealogical table (Ex. 29-a). The provision of law then in force was Regn. 5 of 1804, S. 3 of which requires Collectors to report each case of property devolving on incapacitated heirs. In so doing they are to describe all the circumstances of each particular case. It seems clear to me that the information contained in the Collector's report, including this table, was submitted in accordance with that direction. We have not been furnished with information whether any more specific rules for the guidance of Collectors were in existence under that Regulation but it is perhaps worthy of note that a rule framed under the Court of Wards Act, 1902, now requires that the report shall include the names, ages, and relations of the proprietor and of rival claimants, if any, to the estate and the validity of their respective claims, and also the names, ages and relation of all other members of the family. According to defendant 1, the Tahsildar made an inquiry upon which this report was no doubt based, and I think that the statements in the report, and in particular

(13) [1903] 25 All. 143=30 I. A. 27=8 Sar. 367 (P.C.).

(14) [1904] 51 Cal. 871=31 I. A. 127=8 Sar. 635 (P.C.).

(15) A. I. R. 1927 Pat. 61=101 I. C. 289=5 Pat. 777.

(16) A. I. R. 1927 Mad. 844=104 I. C. 468=50 Mad. 877.

the family tree, are relevant under S. 35, Evidence Act. It must always be a question of drawing a line between records and correspondence which do, and those which do not fall within the scope of that section. But where there is a statutory duty laid upon public officers to investigate and report facts, I cannot doubt that a report of the facts elicited by their investigation is an official record within the meaning of the section. As to the value of this tree, it is not suggested that on the occasion of its preparation defendant 1's adoption was in dispute, and the only specific reason for showing the Kannakulam branch seems to have been to exhibit the natural, as well as the adoptive position of Gopalaswami in the family. I think therefore that a good deal of weight may be attached to this record.

The third table, Ex. 9-A, was compiled in another inquiry under the Court of Wards Act. On the death of Venkatakrishna defendant 1 asked for Government management on the ground that Alamelu Achi was not equal to the task. Here again there was no suggestion that defendant 1 was other than a reversionary heir by reason of his adopted status, the only difference of opinion revealed by the records was as to whether the Government should take over the management. In view of this I think that besides being admissible under S. 35, this table may be viewed in another aspect, as a statement relevant under S. 32 (5) of the Act. It has been signed by three persons other than defendant 1 himself Rangaswami Pillai, Sambasiva Pillai and another Rangaswami. The first of these was related to the family in a number of ways, being among other things the husband of Alamelumangathayi and also the plaintiff's paternal uncle. Similarly, Sambasiva Pillai was the brother of Alamelu Achi and therefore Venkatakrishna's maternal uncle, and the father-in-law of Venkataranga Pillai, Venkatakrishna's elder brother. The third signatory was a karyasthan, and we need not trouble about his opportunities of knowledge, but it appears to me that the statements by the two former persons are qualified for admission under S. 32 (5). In this country the rule governing such cases is wider than in England where it applies only to blood relations and their consorts: 13 Halsbury 470. It has been stated by the Judicial Committee in *Garuradhwaja Pra-*

sad v. Superundhwaja Prasad (17) that for the purpose of proving relationship statements of deceased relatives, servants, and dependants of the family are admissible and in every instance, it must be a question of fact as to whether the person who made the statement had special means of knowledge. I think that upon this footing also this statement is admissible.

My conclusion is therefore that the three pedigrees discussed above are admissible in evidence. I can find no reasons to doubt the correctness of the relationship which they represent. The other evidence places beyond question the fact that defendant 1 was recognized by members of the Kannakulam branch as a dayadi or agnatic heir. It is a priori probable therefore that the precise manner in which he, as adopted son, was related to that branch was known. These pedigrees originated in circumstances giving no ground for the suspicion that they were drawn up for the purpose of asserting his claim. I agree with the learned Subordinate Judge that they afford proof of it.

These findings are sufficient to dispose of the plaintiff's suit, which in my view has been rightly dismissed. As my learned brother concurs, the appeal is dismissed with costs of respondents 1 and 2. Advocate's fee Rs. 2,500.

Cornish, J.—I agree.

P.R.S./B.V. *Appeal dismissed.*

(17) [1900] 23 All. 37=27 I. A. 238=7 Sar. 724 (P.C.).

A. I. R. 1932 Madras 207

VENKATASUBBA RAO AND WALSH, JJ.

Kumarappa Chetti and others—Defendants—Appellants.

v.

Muthuvijaya Raghunatha Muthukumara Vanangamudi Valuvatti Thevar (dead) and *others*—Plaintiffs—Respondents.

Appeals Nos. 376 of 1924 and 173 of 1929, Decided on 29th September 1931, from decree of Dist. Judge, West Tanjore, in O. S. No. 4 of 1923, and in O.S. No. 19 of 1924.

(a) **Hindu Law—Partition—Presumption is that it is complete—Person alleging contrary must prove it.**

When it is admitted or proved that a partition has already taken place, the presumption is that it has been a complete partition and it lies upon a person alleging that family property, in the exclusive possession of one of the members of the family after such partition, is liable to be parti-

tioned, to make good his allegation by proof: 7 Bom. H. C. R. 153 and A.I.R. 1923 Cal. 18, Foll. [P 211 C 1]

(b) Civil P. C. (1908), S. 11—Decree wholly in favour of party—No issue decided against him is *res judicata*.

If the decree is wholly in favour of the defendant, no issue decided against him can operate as *res judicata* so as to bind him in a subsequent suit, for, he cannot appeal from a finding on any such issue. If the plaintiff's suit is decreed in its entirety, no issue decided against him can be *res judicata*, for, he cannot appeal from a finding on any such issue, the decree being wholly in his favour: 11 Cal. 301 (P.C.); A.I.R. 1922 P. C. 241 and 23 Bom. 296, Rel. on. [P 211 C 1]

(c) Civil P. C. (1908), S. 11—Mere presence of party on record is not decisive of the question of *res judicata*—Finding in previous suit held not *res judicata*.

A, one of the five brothers A, V, S, R, and C lent a sum of Rs. 13,000 to Z on a mortgage deed, the deed being taken in the name of A. Subsequently the last three brothers S, R, and C lent to the same person a sum of money on a second mortgage of the same properties, the deed being taken jointly in favour of the three brothers. This deed provided for the payment by them of Rs. 13,000 due to A, which was never paid. C and R assigned their share to A, who brought a suit against S and Z for recovery of Rs. 13,000 as well for the money due under the assignment. Z pleaded that the amount of the first mortgage belonged not to A alone but to the joint family of which he was a member. S pleaded that the family was joint but by some arrangement S, R and C had become exclusively entitled to the mortgage amount viz., Rs. 13,000. A finding was given in this suit that the Rs. 13,000 belonged not to A solely but to the joint family. S subsequently brought a suit against A for the fifth share of Rs. 13,000 on the ground that it belonged to the five brothers jointly and it was contended that the findings in the previous suit operated as *res judicata* in his favour.

Held: that the question whether the money was the property of the five brothers jointly was not directly and substantially in issue between the same parties, that is, between A and S and that the finding in the previous suit did not constitute *res judicata* in S's favour, the mere presence of a party on the record not being decisive of the question when *res judicata* is raised: 27 All. 59 and 25 Bom. 589, Rel. on. [P 212 C 1]

K. S. Shankara Ayyer and K. R. R. Sastri—for Appellants.

B. Sitarama Rao and S. R. Muthuswami Ayyer—for Respondents.

Venkatasubba Rao, J.—These appeals relate to the ownership of a certain sum of money. To dispose of them it is unnecessary to refer to more than a few facts. There were five brothers: (1) Adaikkalam Chetty, (2) Veerappa Chetty, (3) Subban Chetty, (4) Rengan Chetty and (5) Vaidyalinga Chetty. In 1885, Adaikkalam lent on the mortgage of certain properties a sum of Rs. 13,000 to a person whom we shall call the zamindar. The deed of mortgage

was taken in the name of Adaikkalam. In 1888, the last three brothers (Subban, Rengan and Vaidyalinga) lent to the same person Rs. 4,000 on a second mortgage of those properties. The deed was taken jointly in the names of the three brothers mentioned above. That deed provides for the payment by them of Rs. 13,000 due to the first mortgagee Adaikkalam. He however was not paid and the mortgage in his favour remained in force. On 28th December 1905, Vaidyalinga assigned by Ex. 2 his one-third share in Rs. 4,000 in favour of Adaikkalam. On 6th January 1906, Rengan similarly assigned his share in favour of the same person (Ex. 3). On 10th October 1906, Adaikkalam filed O. S. No. 49 of 1906 to enforce his rights under the two mortgages referred to above.

In that suit, the zamindar was made defendant 1 and Subban, Adaikkalam's brother, the second. As subsequent mortgagees, certain others were impleaded as defendants 3 to 6. Adaikkalam as plaintiff claimed not only Rs. 13,000 but also two-thirds of Rs. 4,000 basing his right thereto on the assignments executed in his favour by Rengan and Vaidyalinga. In the plaint in that suit, he alleged that Subban was entitled to a third of Rupees 4,000, that he was therefore asked to join with him as plaintiff and that on his failing to do so, he was impleaded as a defendant. He prayed that a decree might be passed both in favour of himself and Subban for the respective amounts due to them. In effect, Adaikkalam asked for no relief against Subban but prayed, on the contrary, that a decree might be passed both in his and Subban's favour. The suit was resisted both by the zamindar and Subban. To the defence raised by Subban, we shall advert presently. The zamindar pleaded *inter alia* that the amount of the first mortgage belonged not solely to Adaikkalam, but to the joint family of which he was a member and that the suit was bad for the non-joinder of the other co-parceners. An issue was framed as to whether Adaikkalam was solely entitled to the sum of Rs. 13,000 and the trial Judge, coming to the conclusion that it did not, dismissed the suit. From his decree an appeal was taken to the High Court (Appeal No. 189 of 1909). What the effect is of the decision then given by the High Court, is one of the matters we have to decide. For the present, it is sufficient to state that the High Court

allowed the appeal of Adaikkalam and passed a decree in his favour, holding nevertheless that the Rs. 13,000 belonged not to him solely, but to the joint family. In the present appeals, the question to decide is: Is Subban Chetty entitled to a fifth of this sum of Rs. 13,000? There were two suits filed in the lower Court and each of them raised the question: Is Subban Chetty entitled to a fifth of the amount or is Adaikkalam the sole owner? For the sake of brevity, Subban Chetty may be treated as the plaintiff and Adaikkalam as the defendant. The lower Court has disallowed the claim of Subban Chetty.

On behalf of Subban, his learned counsel, Mr. K. S. Sankara Ayyar, has strongly urged that the decision of the High Court in O. S. No. 49 of 1906 operates as *res judicata* in his favour. Before examining that contention we shall deal with the merits of the case. The question of fact that arises is: On the date of the mortgage suit, to whom did the Rs. 13,000 belong? To Adaikkalam solely or to the five brothers jointly?

In Suit No. 49 of 1906, that question, as we have said, was raised at the instance of the zamindar. Adaikkalam's case then was, that there was a partition of the joint family property in 1882 and that the sum lent in 1885 was his separate property. Subban, after pleading that the family in 1885 was joint, went on to allege, that by some arrangement, the last three brothers (Subban, Rengan and Vaidyalinga) became exclusively entitled to the mortgage amount, namely, Rs. 13,000. It is important to bear in mind that each of the three contending parties gave a different version, Adaikkalam stating that the amount was his separate property; the zamindar, that it belonged to the joint family; and Subban, that it belonged solely to the last three brothers. We may usefully quote a passage or two from Subban's written statement:

"Then, I, Rangan Chetty and Vythi Chetty, in all three persons, arranged that the said bond for Rs. 13,000 should be allotted to our share, at the time of future division of our family properties; that the plaintiff should have no right whatever to the said bond of Rs. 13,000; that he should not claim any right to it; that we three alone should jointly pay Rs. 4,000 to defendant 1; and that in respect of the Othi deed for Rs. 17,000 to be obtained from defendant 1 in our favour after such payment, plaintiff should have no right whatever. We paid Rs. 4,000 to defendant 1 and obtained an Othi deed for Rs. 17,000 on 21st June 1888."

"Thereupon the plaintiff and the deceased Veerappa Chettiar lived together and myself and the other two brothers, namely, Rangan Chettiar and Vythi Chettiar together. Subsequent to our Othi deed for Rs. 17,000 the plaintiff had no sort of enjoyment in the villages in dispute."

"From the date of the said Othi deed, we three have been enjoying the suit villages adversely to the plaintiff. From the date of our Othi deed for Rs. 17,000, the plaintiff had no sort of claim or enjoyment whatever in the suit villages."

In effect, Subban denied Adaikkalam's right to any part of the sum of Rs. 17,000 and distinctly prayed that the suit should be dismissed with costs. The significance of this will shortly appear when we consider the point of *res judicata*. But to proceed: the trial Court, as we have said, dismissed that suit, holding that Adaikkalam and his brothers were undivided and that the money belonged jointly to all of them. The High Court, while confirming the finding that the amount was their joint property, set aside the decree dismissing the suit. On what grounds, then, did the High Court come to that decision? It held: (1) that Adaikkalam was on the date of the transaction of 1885 living separately, but that he took the mortgage in his own name with funds in which his brothers were interested and had a share; (2) there was no ground for supposing that when Adaikkalam lent the money he was acting as the managing member of an undivided family or was representing any interests but his own: see *Adaikkalam Chetti v. Subban Chetty* (1). On these findings the learned Judges held as a question of law that the mortgagee could maintain the suit in his own name. They then go on to observe, that even assuming that Adaikkalam was on the date of the mortgage the managing member of an undivided family, he could still sue on the contract entered into by him in his own name, without impleading the other members of his family: see p. 626 (27 M. L. J.) Acting on this view, the High Court decreed Adaikkalam's suit. But since then an important event, which alters the aspect of the case, has occurred. A suit commenced in 1919 was, after these appeals had been filed, finally decided by the High Court in 1930. That was a suit filed by Vaidyalinga's widow against the other members of his family. In that suit, the question as to the status of the family was directly raised. Was there a partition and, if so, when? The High

(1) A. I. R. 1915 Mad. 387=26 I. C. 35.

Court held: (1) that in 1887 there was a partition among the five brothers; and (2) that the last three brothers who reunited became divided in 1905. It is common ground that by this finding as to the status of their family, the parties are bound. When the High Court decided the mortgage suit of 1906 none of the three contestants put forward the partition of 1887. When we approach the evidence in the case this fact must be borne in mind. Having regard to the then contentions all that the High Court had to decide was, whether Adaikkalam became divided in 1882, that is, previous to the mortgage. If that was found in the negative, it necessarily followed that the money was the property of the joint family. But the recent decision has declared that there was a partition in 1887, that is, subsequent to the mortgage. If so, whose property did this mortgage become by reason of that partition? That is the question we have now to decide—very different from what the High Court had then to determine. Having this in view let us proceed to examine the evidence.

When the second mortgage (the one of 1888) was executed, Subban and his two brothers agreed to redeem the first mortgage in favour of Adaikkalam. The mortgage deed contains a stipulation that they were to pay him Rs. 13,000. If Subban's present case is true, he and his two brothers were entitled to three-fifths of that amount. Why then did they agree to pay the entire Rs. 13,000 to Adaikkalam? To this admission, made as it were close after the partition of 1887, great weight must be given; for, it is Subban's case that the mortgage was at that partition kept joint. Then, again, in the 1905 partition, Subban and his two younger brothers treated this mortgage as the joint property belonging to them exclusively. How is this conduct of Subban consistent with the mortgage having been set apart as joint property in 1887? We have already said that Rangan and Vaidyalinga assigned their interests in the Rupees 4,000 to Adaikkalam. This happened shortly before the suit of 1906. In the assignment deeds, these two brothers distinctly recognize Adaikkalam's sole right to the sum of Rs. 13,000. Then came the mortgage suit of 1906. Subban did not then set up, as we have pointed out, that the Rs. 13,000 was the joint property of

the five brothers. He alleged, on the contrary, that it was the sole property of himself and his two younger brothers. What value then can be attached to his present case that he is entitled to a fifth of the sum, on the ground that it belongs to the five brothers jointly? His plaint is as vague as it can be on the point. The only person examined in the case is Adaikkalam, who of course denies Subban's claim. The depositions in O. S. No. 49 of 1906 of Subban, Rengan and Vaidyalinga, have been treated as evidence those persons having since died. There was, they deposed, a partition in 1887; but, according to them, it was an incomplete one. Rengan stated that in property worth about Rs. 20,000 Adaikkalam refused to give the others a share and that the Rs. 13,000 in question was a part of that Rs. 20,000. Referring to the undertaking by him, Subban and Vaidyalinga to redeem the first mortgage, this is what he says:

"It is only with the idea of paying Rs. 13,000 to the plaintiff (Adaikkalam) that we obtained the document for Rs. 17,000."

There is nothing worth noting in Vaidyalinga's deposition, beyond the fact that he spoke to the partition of 1887 and admitted that the sum of Rs. 13,000 belonged to Adaikkalam. Subban was concerned with making out that the defence he set up in his written statement was true, namely, that he and his two brothers became the exclusive owners of Rs. 13,000. As regards the partition of 1887, he stated that it was an incomplete one, as Adaikkalam did not include "Athani village, some jewels and the deed for Rs. 13,000." He then went on to suggest, that at the time of the second mortgage, Adaikkalam gave up his right to the Rs. 13,000 saying: "that he (Adaikkalam) would adjust the sum of Rs. 13,000 from the unpartitioned jewels and other properties."

What then emerges from these facts? That Adaikkalam asserted at the partition of 1887 his sole right to this sum, that it accordingly was not made the subject of division, that in 1888, shortly after the partition, all the three brothers recognized his right; that two of them (Rengan and Vaidyalinga) in 1905 and 1906 admitted his title in the assignments and in the suit that followed, gave evidence in support of it, and (this is significant) they have consistently adhered to this position and have never since claimed any right in the suit amount.

Moreover, the burden was upon Subban to prove that the partition was not a complete one. When it is admitted or proved that a partition has already taken place the presumption is that it has been a complete partition and it lies upon a person alleging that family property, in the exclusive possession of one of the members of the family after such partition, is liable to be partitioned, to make good his allegation by proof. *Narayan Babaji v. Nana Manohar* (2) at p. 177. There is no presumption that any property was excluded at a partition; on the contrary, the burden lies upon him who alleges exclusion to establish his assertion. *Kailas Chandra Nag v. Bijay Chandra Nag* (3). Both on the evidence and the probabilities, we must find that Subban's claim to a fifth of this sum is unfounded. The finding to the contrary of the lower Court in C. S. No. 19 of 1924, one of the two suits out of which these appeals arise given as it was before the recent adjudication by the High Court, is not entitled to any weight.

Now that Subban has no case on the merits, can he succeed on the point of res judicata? In O. S. No. 49 of 1906 there was a finding that the money belonged to the five brothers, but in spite of it Adaikkalam's suit was decreed. The decree far from being based on the finding as to the ownership of the money, was made "in spite of it." In such a case, no issue decided against the plaintiff can be res judicata. The law on the point may be thus stated. If the decree is wholly in favour of the defendant no issue decided against him can operate as res judicata so as to bind him in a subsequent suit, for he cannot appeal from a finding on any such issue. Conversely, if the plaintiff's suit is decreed in its entirety no issue decided against him can be res judicata for he cannot appeal from a finding on any such issue the decree being wholly in his favour: see Mulla's Civil Procedure Code, Commentaries on S. 11. The first part of this rule is illustrated by *Run Bahadur Singh v. Lucho Koer* (4). The suit was brought by a Hindu against the widow of his deceased brother claiming his property by right of survivorship. The suit was dismissed upon a technical ground; but it was nevertheless found as a question of

fact that the brothers were joint in estate. In this case the widow wholly succeeded, although the finding was against her. The Judicial Committee held that the finding did not constitute res judicata against the widow. *Midnapore Zamindari Co. Ltd. v. Naresh Narain Rai* (5), recognizes the same principle. In a suit against certain tenants, they pleaded: (1) occupancy right; (2) that the suit was premature.

The High Court dismissed the suit on the ground that the suit was premature, but gave a finding that the tenants had no occupancy right. Their Lordships held that the finding on the question of occupancy rights did not operate as res judicata against the tenants as the decree was wholly in their favour and they could not have appealed from the finding: see pp. 467 and 468.

The second part of the rule (it is with this we are concerned) is illustrated by *Rango v. Muniyappa* (6). A alleging that he was the adopted son of X sued P to recover certain property granted to him by X under a deed. The Court found that A was not the adopted son of X, but that he was nevertheless entitled to the property under the deed and a decree was passed for A. A's suit was thus decreed in its entirety, in spite of the finding against him on the question of adoption. It was held that that finding did not operate as res judicata in a subsequent suit between A and B; for the decree having been in favour of A, A could not have appealed from the finding that was adverse to him.

But, contends Mr. Sankara Ayyar, the learned counsel for Subban, the High Court did not give merely a finding, but made it the basis of a part of their decree. As the money was held to be the property of the joint family (Mr. Sankara Ayyar contends), the High Court, in order to safeguard its interests, directed Adaikkalam to give security. The judgment, we must say, is not clear on the point. Was this direction given as a necessary consequence of their finding or on account of the offer made by Adaikkalam's counsel? However we consider it unnecessary to examine this point further, having regard to our view on the next contention of Mr. Sitarama Rao as to res judicata with which we shall now deal.

(2) [1870] 7 B. H. C. R. 153.

(3) A. I. R. 1923 Cal. 18=72 I. C. 680.

(4) [1885] 11 Cal. 301=12 I. A. 23=4 Sar. 602 (P. C.).

(5) A. I. R. 1922 P. C. 241=64 I. C. 231=48 I. A. 49=48 Cal. 460 (P. C.).

(6) [1899] 23 Bom. 296.

That contention, in our opinion, must prevail. In the previous suit, was this question as to the ownership of the money directly and substantially in issue between the same parties, that is to say, between Adaikkalam and Subban? It was the zamindar (as we have pointed out) that pleaded that the money was the property of the joint family. Subban, far from pleading that it was his property, alleged that it belonged exclusively to the last three brothers. The other members of the coparcenary had not been impleaded and can it be said that Subban was representing the absent members? The case he set up was adverse to their interests and the point on which the finding in question was given was different from the one he raised. Supposing the finding had been against the joint family could the absent members have been bound? If it could not have been res judicata against them, it could not be res judicata in their favour. The mere presence of a party on the record is not decisive of the question when res judicata is raised: see *Malhi Kumar v. Imamuddin* (7), where it was pointed out that the plaintiff and the newly added defendants were not at issue on the point raised: see also *Ramdas v. Vazir Saheb* (8). We cannot accept Mr. Sankara Ayyar's argument that because Subban happened to be a party to that suit he could take advantage of the finding, although his absent brothers could not. In O. S. No. 49 of 1906 it was not the exclusive title of the last three brothers that was found, but the joint title of all the five. If the Court had found in favour of Subban's case Adaikkalam would have had no right at all. But in the present suits his right to a fifth is admitted by Subban and it is on the footing that each of the other brothers has likewise a fifth share that Subban has now claimed a share for himself. We must therefore decide that the finding in the previous suit does not constitute res judicata in Subban's favour.

The lower Court has also held on the point of res judicata against Subban, but on an erroneous ground.

We have thus held that Subban cannot succeed on the point of res judicata. We have further held that on the merits he is bound to fail. In this view, it is unnecessary to decide the other points

raised in the case. The result is that the decree of the lower Court in O. S. No. 19 of 1924 is confirmed and the appeal (No. 173 of 1929) is dismissed with costs. It follows that Appeal No. 376 of 1924 is also dismissed, but we make no order as to costs.

P.R.S./P.N.

Appeal dismissed

A. I. R. 1932 Madras 212

JACKSON, J.

(*Raja Srimathu*) *Muthuvijaya Raghunatha Doraisingam*—Defendant—Appellant.

v.

N. A. Swaminathan Chettiar and others—Plaintiffs—Respondents.

Second Appeal No. 678 of 1928, Decided on 9th October 1931, against decree of Court of Sub-Judge, Sivaganga, in Appeal Suit No. 36 of 1926.

Civil P. C. (1908), O. 22, R. 11—Joint decree-holders—Abatement of appeal against one operates as abatement against all.

When an appeal abates against one of several joint decree-holders it abates against all.

[P 213 C 1]

K. Kuttikrishna Menon—for Appellant.

M. Patanjali Sastri—for Respondents.

Judgment.—The short point in this second appeal is whether when the suit abates against one of several joint decree-holders it abates against all. The District Munsif decreed

"that plaintiff and defendants 6 to 31 be put in possession of the Rajali Kaduvetti fields."

The appeal abated against defendant 25. The appellant, defendant 1, wants it declared that the decree-holders have no right to the fields, or to disturb his occupation. Now defendant 25 under the decree gets the right and can oust defendant 1. Is it worthwhile considering whether the remaining defendants have or have not the right? The line of argument is that if these remaining defendants had brought a bona fide representative suit they could have litigated the right of defendant 25, and this appeal can go on in his absence on the same line of reasoning. This illustrates the danger of carrying principles applicable to one set of circumstances into another. In *Sonachalam Pillai v. Kumaravelu Chettiar* (1) it has been ruled that where persons litigate bona fide in respect of a common right the suit will operate as res judicata, against others enjoying this common right, even

(7) [1905] 27 All. 59=1 A. L. J. 363.

(8) [1901] 25 Bom. 589=3 Bom. L. R. 179.

(1) A. I. R. 1928 Mad. 77=107 I. C. 625=51 Mad. 128 (F.B.).

though they have received no notice under O. 1, R. 8 of the suit.

But here we have a person who has been a party to the suit and has obtained a decree, and it is impossible by analogy to say that his right can be litigated in his absence by other persons on appeal. The correct view, with all respect, is clearly laid down in *Srinivasalu Chetti v. Guraviah* (2). The appeal must be dismissed: cf. *Maula Bux v. Chanan Mal* (3). Nor can it be argued that the absence of defendant 25 is immaterial because the interest of the defendants are separable as in *Sant Singh v. Golab Singh* (4). In the decree defendant 25 is not given a separate interest apart from that of the other defendants, and his right cannot be cut up in his absence. The appeal fails and is dismissed with costs.

P.R.S./B.V. *Appeal dismissed.*

(2) A. I. R. 1927 Mad. 505=101 I. C. 655.

(3) A. I. R. 1926 Lah. 332=94 I. C. 563.

(4) A. I. R. 1928 Lah. 572=114 I. C. 417 = 10 Lah. 7 (F.B.).

A. I. R. 1932 Madras 213

WALLER AND PANDALAI, JJ.

Pichiguntla Katti Ramudu—Prisoner—Accused.

v.

Emperor—Opposite Party.

Referred Trial No. 115 of 1931, and Criminal Appeal No. 398 of 1931, Decided on 9th October 1931.

Madras Children Act (1920), S. 37—“Due enquiry” should be made about the actual age of child—Burden of proof that accused is child rests on accused.

It is quite clear that S. 37 requires that a “due inquiry” into age shall be made and that evidence shall be taken. There is a tendency among Judges and Magistrates to be content with the most perfunctory inquiry and to find that an accused is a young person on most inadequate evidence. The burden of proof in such a matter must be on the accused, though, naturally in any case of doubt the Judge would be careful to give him the benefit of the doubt. But the doubt must be real. It is obviously most desirable from several points of view that a declaration of age under S. 37 should not be made except on adequate and proper evidence.

[P 214 O 1]

K. W. Rama Rao—for Accused.

Public Prosecutor—for the Crown.

Judgment.—This case discloses a callousness and disregard for human life, which are absolutely horrifying. The appellant and his co-accused have been convicted of the murder of a little boy called Naganna. He was as usual, engaged in tending his father's goats. The accused were in need of money to spend at a fair

and decided to steal some of the goats. They stole one, squeezed its throat and killed it. When they caught another, it bleated and Naganna ran up and threatened to tell his father. The appellant then knocked him down, held him fast and told the other accused to draw a knife from his waist and cut the boy's throat. This accused 2 proceeded to do with as little compunction as if he had been cutting the throat of a goat. They then hid the body till night when they dropped it into a well and made off with the living goat, which they left with P. W. 7. Naganna's father found in the evening that his son and two of his goats were missing. Learning from P. W. 4 that he had seen the accused at the place where his son had been and talking to him he made a search and eventually found one of the goats lying dead and some traces of blood. He communicated with the authorities and the police came. Having information that the accused were in hiding in a cave, the Sub-Inspector and others arrested them, after which they pointed out the well into which the body had been thrown and it was recovered. They also gave information about the goats entrusted by them to P. W. 7, and it was identified by Naganna's father as his missing goat. Some time later, both of them made full confessions to the Sub-Magistrate. They have retracted those confessions, but every precaution was taken to ensure that they were voluntarily made and we can find no ground for concluding that they were the result of pressure. There is therefore a complete and conclusive case. We think that the Judge and three of the assessors were right in finding that the accused were guilty. The fourth assessor differed from them because there were no eyewitnesses which was of course, no reason at all. We must confirm the conviction of the appellant. The sentence is the only possible sentence and that also is confirmed.

The other accused has not appealed, the Judge finding that he was only fourteen years of age and therefore committed him to a Senior Certified School for a period of four years. We think it our duty to point out that this finding was arrived at on quite inadequate evidence. The Doctor was asked, in the course of his cross-examination, what he thought the age of accused 2 was and he replied: “Fourteen.” Asked fur-

ther for his reason, the only reason he gave was that he had not cut his wisdom teeth. That was by itself, a quite insufficient basis for his opinion, as on statistics, wisdom teeth are at least as likely to be cut after as before sixteen years of age. In addition to which accused 2 had himself given his age as seventeen. It is quite clear that S. 37, Children Act, requires that a "due inquiry" into age shall be made and that evidence shall be taken. We have noticed a tendency among Judges and Magistrates to be content with the most perfunctory enquiry and to find that an accused is a young person on most inadequate evidence. The burden of proof in such a matter must be on the accused, though naturally, in any case of doubt, the Judge would be careful to give him the benefit of the doubt. But the doubt must be real. It is obviously most desirable from several points of view that a declaration of age under S. 37 should not be made except on adequate and proper evidence. In the first place, it is important from the point of view of the public interest, that criminals should suffer the legal penalty for their offences and not escape on an unduly lenient finding as to age. In the next, a proper inquiry and finding are essential, for the declaration of age is final and cannot be interfered with in appeal or revision. Lastly there is the question of the length of detention in the Certified School. In this particular case, the doctor, in re-examination, was ready to put the age up to 15 and yet the Judge committed the accused for four years—a year longer than was necessary.

P.R.S./B.V.

Order accordingly.

* * A. I. R. 1932 Madras 214

WALLACE, J.

Ganapathy Goundan — Accused 1 —
Petitioner.

v.

Emperor—Opposite Party.

Criminal Misc. Petn. No. 723 of 1931,
Decided on 23rd November 1931, from
judgment of Stationary Second Class
Magistrate, Palladam, in P. R. C. No. 14
of 1931.

* (a) Criminal P. C. (1898), S. 197 (1)—
"While acting or purporting to act in dis-
charge of his official duty" — Meaning ex-
plained.

In S. 197 the phrase "while acting or purport-
ing to act in the discharge of his official duty,"

means doing or purporting to do the sort of act which the law or rules framed under the law allow him to do by virtue of his office. To require sanction for his prosecution it must be an act which has some connexion, other than accidental or temporary, with what he is doing or purporting to do in the exercise of his official duty, i.e., be the sort of act which he is empowered to do by virtue of his office.

[P 214 C 2 ; P 215 C 1]

* * (b) Criminal P. C. (1898), S. 197 (1)
— Village Magistrate confining persons sus-
pected of murder and torturing them to
extort confession charged with offences under
Ss. 330, 343 and 348, I. P. C. — Sanction
is required under S. 197 for prosecuting him
under Ss. 343 and 348, I. P. C., but for S. 330
no sanction is required—Penal Code (1860),
Ss. 330, 343 and 348.

A Village Magistrate held in confinement cer-
tain persons who were suspected to have commit-
ted a murder and also tortured them in order to
extort a confession from them. He was charged
for committing offences under Ss. 330, 343 and
348, I. P. C.

Held : that sanction to prosecute him under
Ss. 343 and 348, I. P. C., was required under
S. 197 (1), Criminal P. C., but for prosecuting him
under S. 330, I. P. C. no such sanction was re-
quired: *A. I. R. 1929 Mad. 172* and *A. I. R. 1927
Mad. 566, Ref.* ; *A. I. R. 1929 Mad. 659, Dist.*

[P 215 C 1]

K. S. Jayarama Ayyar and *R. Desikan*
—for Petitioner.

Public Prosecutor—for the Crown.

Order. — Petitioner seeks to have
quashed the order of the Sub-Magistrate,
Palladam, committing him for trial to the
Sessions Court, Coimbatore, for offences
under Ss. 330, 343 and 348, I.P.C. Peti-
tioner is a Village Magistrate and contends
that the commitment is invalid for want
of sanction under S. 197 (1), Criminal
P. C. The allegation is that on a com-
plaint put in to him by D. W. 6, brother
of a woman called Ramakkal, wife of
P. W. 2, petitioner sent for P. Ws. 1, 2
and 3 at different times, had them brought
by the village menials to the chavadi and
shut them up there, and while they were
there also tortured P. Ws. 1 and 2 by
pushing needles under their finger nails,
in order to extort a confession of the
murder. As a matter of fact, the woman
had not been murdered and turned up
later safe and sound. It is urged that as
the Village Munsif has authority to arrest
and confine suspected murderers, the
alleged offences were committed by him
"while acting or purporting to act in the
discharge of his official duty."

The exact import of that phrase and of
the vaguer phrase which stood in its place
prior to the amendment of 1923 has been
the subject of numerous decisions. My

own view is that the phrase in the amended section means :

"doing or purporting to do the sort of act which the law or rules framed under the law allow him to do by virtue of his office."

It is only in respect of acts done under colour of his office that a Village Munsif is entitled to and is given protection under the section. In this view there is no difficulty in deciding the case so far as the allegation of wrongful confinement is concerned. Confinement of a person on suspicion that he has committed a murder is permitted to the Village Munsif by S. 13, Madras Village Police Regulation, 11 of 1816. So that such confinement is the sort of act which the law will in certain circumstances permit. In a case then where the circumstances do not in law justify the confinement, the Village Munsif would nevertheless be purporting to do an Act which is permitted by virtue of his office and S. 197 would apply. The charge under Ss. 343 and 348 involves the charge of wrongful confinement and therefore will require previous sanction under S. 197. But where the act is not the sort of act which the Village Munsif is permitted by the law to do, I do not see how it can be contended that in committing it he is acting or purporting to act in the discharge of his official duty. It cannot be contended that his official duty permits him to do anything of the nature of causing hurt or applying torture to persons confined by him lawfully or under pretext of law. I would therefore be prepared to hold that in the matter of the alleged offence under S. 330 no sanction is required.

It is argued for petitioner that my view is opposed to the latest ruling of a Bench of this Court in *Gangaraju v. Venki* (1), and that that ruling is to be interpreted as laying down that, when the Village Munsif has started out on an official Act and so long as he is continuing to carry out that Act, anything and everything he does in connexion with that Act is done or purports to be done in his official capacity, so that, as I put it to petitioner's learned counsel, if the Village Munsif, by virtue of his office, puts a woman in confinement and then commits rape on or adultery with her, or murders her, he is doing those things while acting or purport

ing to act in his official capacity. I do not think the Bench intended to lay down any such proposition.

It is a sound rule that no judgment is to be pressed further than was necessary for the facts of the case with which it was dealing. The offence alleged in *Gangaraju v. Venki* (1) was wrongful confinement an act which, as I have already noted, might be and in that was a clear case of the Village Munsif purporting to Act in his official capacity. My attention was specially called to the words of the learned Judge at p. 608 :

"We hold that, if the offence alleged was committed by the public servant, while he was actually engaged in or purported to be engaged in the discharge of his official duty, sanction is required," and to the dissent of the learned Judges to the ruling of Curgenvin, J., in *Sivaramakrishna Ayyar v. Seshappa* (2). I do not imagine that the learned Judges intended to lay down that for any act whatsoever amounting to an offence done by the Village Munsif during the time when he was discharging or purporting to discharge his official duty, whether it had any connexion with his official duty or not, sanction would be required for his prosecution. It must, as I have said, be an act which has some connexion, other than accidental or temporary, with what he is doing or purporting to do in the exercise of his official duty, i.e., be the sort of act which he is empowered to do by virtue of his office. In this view of *Gangaraju v. Venki* (1) I do not see any necessity to refer the matter to a Full Bench. My view is in accordance with that of Jackson, J., in *K. Raja Rao v. T. Ramaswamy* (3). I hold therefore sanction is necessary for the prosecution of the offences under Ss. 343 and 348, but not for that under S. 330. I therefore quash the commitment for offences under Ss. 343 and 348. The trial will proceed for the offence under S. 330.

P.R.S./B.V.

Order accordingly.

(2) A. I. R. 1929 Mad. 172=115 I. C. 248=30
Cr. L. J. 396=52 Mad. 347.

(3) A. I. R. 1927 Mad. 566=102 I. C. 347=28
Cr. L. J. 539=50 Mad. 754.

(1) A. I. R. 1929 Mad. 659=1929 Cr. C. 140=118 I. C. 102=30 Cr. L. J. 864=52 Mad. 602.

A. I. R. 1932 Madras 216

JACKSON, J.

(Gadamchetty) Subramanyam — Petitioner.

v.

(Dronadthula) Veeraraghavulu — Respondent.

Criminal Revn. Case No. 294 of 1931, and Criminal Revn. Petn. No. 263 of 1931, Decided on 21st October 1931, from order of Sess. Judge, Guntur Division, D/- 15th January 1931, and made in Criminal Revn. Petn. No. 13 of 1930.

(a) Criminal P. C. (1898), Ss. 436 and 437—Discharge of accused charged with forgery—Sessions Judge moved under Ss. 436 and 437—Judge should order further inquiry if necessary or dismiss application—Pendency of suit by accused in civil Court in the matter is irrelevant.

Where, on the discharge of the accused charged with forgery, the Sessions Judge is moved under Ss. 436 and 437, the Judge, if he thinks further inquiry necessary, should proceed under Ss. 436 and 437, and if he does not, he should dismiss the application. He has full discretion in the matter. The circumstances that the accused has lodged a civil suit in respect of the same matter is absolutely irrelevant to the question which is before the Judge, whether the discharge of the accused should or should not be set aside.

[P 216 C 1, 2]

(b) Criminal P. C. (1898), Sch. 2—Forgery—Trial—Penal Code, S. 463.

Forgery is an offence of too grave a public importance to be made merely triable by Subordinate Magistrate.

[P 216 C 2]

V. Govindarajachari and *K. Krishna-murthy*—for Petitioner.

Konda Kottayya—for Respondent.

Public Prosecutor—for the Crown.

Order. — The petitioner complained against the counter-petitioner for forgery; the counter-petitioner then filed a civil suit in regard to the same matter. The Sub-Magistrate discharged the accused, and the Sessions Judge when moved under Ss. 436 and 437, Criminal P. C., was apparently disposed to order further inquiry but did not do so because the prosecution of the complaint would be "embarrassing to the civil Court" without being "conclusive or even useful." The matter "had better be left to the civil Courts in the first instance" with a strong precept that if the civil Court thinks the criminal charge substantiated, it will have "no compunction" in taking criminal action.

This order has little merit. If the

Judge thinks further inquiry necessary, he should proceed under S. 436 or S. 437; and if he does not he should dismiss the application. As he says himself, he has a full discretion in the matter. But to such a matter the comparison between civil and criminal Courts is quite irrelevant. If a man accused of forgery lodges a civil suit it cannot be said that his trial should be stayed because it may embarrass the Court that tries the suit. In the first place it will not embarrass it, and in the second, it is entirely immaterial to the administration of criminal justice whether it embarrasses it or not. Of course a criminal conviction duly upheld is both conclusive and useful. There is no justification for the view that civil Courts are a better forum than criminal Courts for judging issues of fact. Therefore the circumstance that this accused person has chosen to lodge a civil suit is absolutely irrelevant to the question which was before the Judge, whether his discharge should or should not be set aside.

Turning to the real question it is found that the complainant and the accused settled their account with no mention at all of the lists which subsequently appeared and are impugned as forgeries. As the learned Judge says Exs. F, S and K go a great way towards showing that Exs. O and P cannot be genuine transactions. That being so, the Court of committal was not in law justified in discharging the accused. Forgery is an offence of too grave a public importance to be made merely triable by Sub-Magistrates.

The learned Judge is directed to proceed under S. 437, which is really the logical conclusion of his fifth paragraph and have the case brought up to the Sessions. It may be observed, as this Court has had occasion to remark before that the matter will then be tried by the same person as would in the ordinary course be ultimately seised of it on the civil side. So long as the District and the Sessions jurisdiction is vested in the same person these invidious comparisons between civil and criminal Courts are utterly beside the point.

The petition is allowed.

P.R.S./R.M.

Petition allowed.

A. I. R. 1932 Madras 217

JACKSON, J.

(*Pulikeezha Variyath*) *Gopal Menon* —
Defendant—Petitioner.

v.

Raman Menon and others—Plaintiffs—
Opposite Parties.

Civil Revn. Petn. No. 666 of 1931, Decided on 3rd November 1931, to revise order of Dist. Court, South Malabar, in Civil Misc. Appeal No. 47 of 1930.

(a) **Jurisdiction—Valuation—Suit for redemption of kanom with added prayer for damages—Proper valuation for jurisdiction is principal amount and not that amount plus damages claimed.**

Where a suit is filed for the redemption of a kanom with an added prayer for a certain sum by way of damages, the proper valuation for jurisdiction is the principal amount secured and not that amount plus the damages claimed: 16 *Mad.* 328, *Ref.*; 5 *Mad.* 284 (*F.B.*); 39 *Mad.* 447; *A. I. R.* 1931 *Mad.* 479 and *A. I. R.* 1926 *Mad.* 764, *Rel. on.* [P 217 C 2]

(b) **Civil P. C. (1908), S. 115—Suit sent for trial to wrong Court—It is material irregularity—S. 115 applies.**

A District Court acts with material irregularity when it sends a suit for trial to the wrong Court, so as to attract the provisions of S. 115.

[P 217 C 2]

K. P. M. Menon—for Petitioner.

A. Parameswaram—for Opposite Parties.

Judgment.—Petitioner seeks to revise the order of the District Judge, Calicut, in C. M. A. No. 47 of 1930 in the matter of court-fees. Plaintiff sued in redemption of a kanom with the added prayer for Rs. 1,100 by way of damages. The question for determination is whether the value of the suit for the purposes of jurisdiction is the kanom amount plus this Rs. 1,100 or the kanom amount alone. Upon the answer will depend whether the suit is triable by Sub-Judge or Munsif.

It has been held in *Zamorin of Calicut v. Narayana* (1) that in a suit for redemption of a kanom the value of the improvements is not to be calculated in ascertaining the value of the suit for the purposes of jurisdiction. In *Konna Panikkar v. Karunakara* (2) it is held that if there are two distinct causes of action, namely, the claim for redemption, and for arrears of rent, the value of the suit is the aggregate value of those two heads of relief. In *Jallaldeen Marakkayar v. Vijayaswami* (3), *Zamorin of*

Calicut v. Narayana (1) is affirmed. The amount of the principal debt must be taken as determining the jurisdiction. In *Grandhi Pothanna v. Satyananda Charyulu* (4) the same rule is followed when the suit is for redemption and surplus profits obtained by the mortgagee.

I have myself held that in those kanom redemption suits the claim for damages is in pari materia with the claim for improvements. *Govindan Nayar v. Ithaleetty* (5). That ruling is based upon previous rulings, and so far as I know has been subsequently differed from. It would seem therefore that the proper valuation for jurisdiction under the law is the principal amount secured, and not that amount plus the damages claimed. Whether *Konna Panikkar v. Karunakara* (2) is or is not rightly decided when the surplusage is a claim for rent, I am not required to decide. When the surplusage is a claim for damages, the law is clear.

The learned Judge seems to be of the same opinion, but he holds that the plaintiff has an option if he likes of treating his two claims as distinct causes of action paying the higher court-fee, and assuming the higher valuation for jurisdiction. *Jallaldeen Marakkayar v. Vijayaswami* (3) is authority for holding that an erroneous payment of court-fee cannot affect jurisdiction. There the plaintiff paid on Rs. 7,218 when he need only have paid on Rs. 3,899, but the appeal nevertheless was referred to the District Court, the High Court refusing to entertain it.

Finally it is argued that this Court will not interfere in revision if the Subordinate Judge is directed by the District Judge to hear a suit which by the provision of S. 15, Civil P. C., should be heard by the Munsif; because although the hearing by the Subordinate Judge infringes that section, he nevertheless has jurisdiction to hear the suit. I think it must be held that the Court acts with material irregularity when it sends a suit for trial to the wrong Court.

The petition must be allowed with costs here and in the lower appellate Court.

P.R.S./B.V.

Revision allowed.

(4) *A. I. R.* 1931 *Mad.* 479=132 *I. C.* 317.(5) *A. I. R.* 1926 *Mad.* 764.(1) [1882] 5 *Mad.* 284 (*F.B.*).(2) [1893] 16 *Mad.* 328.(3) [1916] 39 *Mad.* 447=28 *I. C.* 624.

A. I. R. 1932 Madras 218

JACKSON, J.

Muthukumaraswami Mudaliar—Plaintiff—Appellant.

v.

Govinda Padayachi and others—Defendants—Respondents.

Second Appeal No. 1385 of 1927, Decided on 8th October 1931, against decree of Dist. Court, South Arcot, in A. S. No. 86 of 1926.

(a) Evidence Act (1872), S. 92—Mortgagors undertaking that severally owned hypotheca shall be rateably liable—Oral agreement varying terms of document is not admissible—T. P. Act (1882), S. 82.

Where the terms of the mortgage contract are reduced as required by law to writing on oral agreement varying those terms cannot be admitted in evidence. No proviso to S. 92 saves what in fact runs directly counter to its main provision. If the mortgagors undertake certain obligations as for instance that the severally owned items of the hypotheca shall be rateably liable, one mortgagor can no more set up an oral agreement against his fellow mortgagor for the purpose of varying the terms of the document than he could as against his mortgagee: 44 Cal. 162 and 18 I. C. 696, *Rel. on.*; 10 All. 421 and 25 All. 337, *not Foll.* [P 218 C 2]

(b) Transfer of Property Act (1882), S. 82—“Contract to contrary” is not subsequent contract between mortgagors—(Obiter.).

Obiter.—The “contract to the contrary” in S. 82 is not a subsequent contract between mortgagors and if by a subsequent contract mortgagors distribute their liabilities among themselves that is their personal contract which does not run with the land: 24 Mad. 85, *Rel. on.* A. I. R. 1927 Mad. 1086, *Ref.* [P 219 C 1]

M. S. Vaidyanatha Ayyar—for Appellant.

T. D. Srinivasachari—for Respondents.

Judgment.—Defendants 1 and 2 and two persons Kesavan and Mottayya Samban mortgaged to Ammani Mudali: (1) defendant 1's items 1 to 4; (2) defendant 2's item 5, and (3) the holding of Kesavan and Mottayya Samban.

Plaintiff has bought the Kesavan-Mottayya Samban holding.

Ammani Mudali's assignee filed O. S. No. 173 of 1929, and obtained the decree Ex. F. When it was executed, plaintiff paid off the whole mortgage debt. He now sues for contribution by virtue of S. 82, T. P. Act.

Defendant 2 remains *ex parte*. Defendant 1 pleads that in the original mortgage by an oral agreement he was only a surety and it was agreed with the mortgagee that his property would not be liable to contribution.

The lower appellate Court has upheld this plea and hence the appeal.

When the terms of the mortgage contract were reduced as required by law to writing it is difficult to see how an oral agreement varying those terms can be admitted in evidence. No proviso to S. 92, Evidence Act, saves what, in fact runs directly counter to its main provision. It is hardly necessary to fortify this proposition by case law, but *Krishna Chandra Barman v. Sanat Kumar Das* (1) is directly in point. Also *Narasimma v. Ramasami* (2).

The respondent relies upon *Mulchand v. Madho Ram* (3) and its affirmation in *Shamsh-ul-Jahan Beegum v. Ahmad Wali Khan* (4). It is there ruled that S. 92 only applies to the parties to the instrument who are ranged on opposite sides, like vendor and vendee, or mortgagor and mortgagee, and any exclusion of evidence varying the contractual relations between the several vendees or mortgagors in a document would have the deplorable effect of diminishing the work of the Courts. I do not think that this distinction between the two sides can be read into the section. If the mortgagors have undertaken certain obligations, as for instance, that the severally owned items of the hypotheca shall be rateably liable, one mortgagor can no more set up an oral agreement against his fellow mortgagor, for the purpose of varying the terms of the document than he could as against his mortgagee. But in the present case the oral agreement set up is one between mortgagee and mortgagor. The definite plea is that although defendant came into the document as an ordinary mortgagor he agreed with the mortgagee that he would be in fact only a surety: see D. W. 1. Even *Mulchand v. Madho Ram* (3) will not cover these circumstances.

The next question is whether, supposing oral agreement can be proved, plaintiff is bound by it. The learned District Judge has been careful to confine his finding to the existence of a contract to the contrary within the meaning of S. 82, viz., a contract between mortgagor and mortgagee. Of course if there is such a contract provable plaintiff must be bound by it. It is as though the document in terms said that the debt must

(1) [1917] 44 Cal. 162=34 I. C. 609.

(2) [1913] 18 I. C. 696.

(3) [1888] 10 All. 421=(1888) A. W. N. 127.

(4) [1903] 25 All. 337=(1903) A. W. N. 64.

first be satisfied against the Kesavan-Mottayyan Samban holding with no rateable liability upon the other items.

But the argument in this Court proceeded rather as though the agreement was between the mortgagors themselves, irrespective of the mortgagee. It is not suggested that mortgagors by themselves could alter the rateable liability under the document, otherwise "contract to the contrary" might mean contract between mortgagors, and that is not so: *Ramabhadrachar v. Srinivasa Ayyangar* (5). But it is suggested that mortgagors can come to an agreement by themselves that they will not be rateably bound, and that agreement may run with the land. That would be a distinct subsequent oral agreement under proviso 4 and would have to be in writing; and as in the present case there is nothing in writing it is only academic to discuss whether such agreement if it had been in writing would run with the land. But it may be observed that *Ramabhadrachar v. Srinivasa Ayyangar* (5) is clear authority that it would not.

The respondent relies upon *Veerabhadra Pillai v. Kadambi Ramanuja Ayyangar* (6) a complicated case which for present purpose may be reduced to its simplest terms.

A and B mortgage their several properties to Z. A and B contract between themselves that A's property shall not be rateably liable, when A sells it to D. C buys B's equity of redemption. Z brings C's property to sale. Can C demand rateable contribution from A or his vendee D under S. 82, T. P. Act.

I should be inclined to hold that he can. The contract to the contrary in S. 82 is not a subsequent contract between mortgagors, and if mortgagors are pleased to distribute their liabilities amongst themselves, that is their personal contract, which does not run with the land. If D feels aggrieved when C comes down upon him for rateable distribution his remedy is against B and A, his vendors who made this personal contract. In *Veerabhadra Pillai v. Kadambi Ramanuja Ayyangar* (6) defendant 1's remedy lay against his vendors defendants 2 and 3 and Veeraraghavachari who had guaranteed in Ex. 6 that his liability

under S. 82, T. P. Act, would be limited to a fixed amount.

But as I observe this is merely academic. There is no written contract between the mortgagors and the alleged oral agreement between the mortgagor and mortgagee cannot be admitted in evidence.

The appeal is allowed, and the decree of the District Munsif is restored with costs throughout.

P.R.S./P.N.

Appeal allowed.

* A. I. R. 1932 Madras 219

CURGENVEN, J.

Rakkiyappa Thevan—Petitioner.

v.

Nataraja Thevan—Opposite Party.

Civil Revn. Petn. No. 1738 of 1927, Decided on 22nd October 1931, from decree of Dist. Munsif, Coimbatore, in Small Cause Suit No. 2587 of 1926.

* **Contract Act (1872), S. 25 (3)**—Acknowledgment though not made to creditor, if unconditional may amount to promise—Circumstances of each case should however be considered to see that there is nothing in conflict with such inference.

An acknowledgment even when it is not made to a creditor, may if unconditional amount to a promise. But in adopting such extended meaning of the term "promise" it is highly necessary to examine the circumstances of each case to see that there is nothing in it in conflict with such an inference.

A guardian executed a mortgage bond one of the terms of which was that the mortgagee should retain a portion of the consideration in order to pay the debt, and the mortgagee did not in fact do so but the fact remained that he had assumed the responsibility for doing so and he himself made a promise to that effect to the mortgagor:

Held: that under the circumstances any presumption that the mortgagor by acknowledgment contained in the mortgage bond made an implied promise to the creditor was negated by the circumstances in which it was made. S. 25, Cl. (3), did not therefore apply to the circumstances of the case: 33 Cal. 1047 (P.C.) and A. I. R. 1929 Lah. 591, *Rel. on.* [P 220 C 1]

V. Balasundaram Ayyar — for Petitioner.

R. Desikan—for Opposite Party.

Judgment.—The point taken is that a recital in a mortgage bond executed by the mother of defendant 1 amounted to a promise within the definition of that term in the Contract Act and which was accordingly binding upon defendant 1 and sufficient to make him liable for the amount of the promissory note. It must no doubt be accepted that an acknowledgment even when it is not made to the creditor may, if unconditional, amount to a promise. That has been held by the

(5) [1901] 24 Mad. 85.

(6) A. I. R. 1927 Mad. 1086=101 I. C. 833.

Privy Council in *Maniram Seth v. Seth Rupchand* (1) and it has been followed in such a case as *Hannu Ram v. Jhanda Singh*, A. I. R. 1929 Lah. 591. But in adopting that very extended meaning of the term "promise" I think it is highly necessary to examine the circumstances of each case to see that there is nothing in it in conflict with such an inference. In this case, defendant 1's guardian executed a mortgage bond, one of the terms of which was that the mortgagee should retain a portion of the consideration in order to pay the debt. He did not in fact do so, but the fact remains that as between himself and his mortgagor he assumed responsibility for doing so, and he himself made a promise to that effect to the mortgagor. It appears to me that in such circumstances any presumption that the mortgagor by the acknowledgment contained in the mortgage bond made an implied promise to the creditor is negatived by the circumstance in which it was made. The debtor made arrangements for the payment of the debt by somebody else. It is impossible to hold that at the same time the debtor promised to pay the debt himself. I think accordingly there are no grounds for interfering with the finding of the lower Court that S. 25, Cl. 3, Contract Act, will not apply to circumstances such as this. There is no other point which can properly be taken in revision. The civil revision petition is dismissed with costs.

P.R.S./R.M. *Petition dismissed.*

(1) [1906] 33 Cal. 1047=33 I.A. 167=2 Cr.L.J. 130 (P.C.).

* A. I. R. 1932 Madras 220

MADHAVAN NAIR, J.

Abhiramavalli Ammal—Petitioner.

v.

The Official Trustee of Madras and others—Opposite Parties.

Civil Misc. Appln. No. 861 of 1931, Decided on 30th April 1931.

* Married Women's Property Act (3 of 1874), S. 6—If intention of assured is clear on face of policy that policy should enure for benefit of his wife, then policy should be deemed trust for wife's benefit—No specific words are needed to express such intention.

Section 6 states that the policy shall on the face of it express that it is to be for the benefit of the wife and if it is so expressed, then it says the policy shall be deemed to be a trust for the benefit of his wife. There is nothing in the language of S. 6 to show that the words "for the benefit of his wife" or other words corresponding to these should appear in the policy to enable the

Court to infer a statutory trust in favour of the wife within the meaning of the section. If on reading the words used in the policy it appears that the assured has intended, in the event of his death, that the policy should enure to the benefit of his wife then the policy may be deemed to be a trust for her benefit. [P 221 C 2]

Where the language used in the policy is as follows: "To the assured or his wife Z if he predeceases her" it must be deemed to be a policy of assurance expressed to be for the benefit of the wife of the assured though the express words "for the benefit of his wife" do not appear in the terms of the policy: 32 I. C. 991 and *In re Fleetwood's Policy*, (1926) 1 Ch. D. 48, *Rel. on*; *In re Mellor's Policy*, 6 Ch. D. 127; *In re Mellor's Policy*, (1878) 7 Ch. D. 200; *In re Adam's Policy Trusts*, (1883) 23 Ch. D. 525; *In re Seyton v. Satterthwaite*, (1887) 34 Ch. D. 511; *In re M*, (1899) 1 Ch. D. 79; *Griffith's Policy*, (1903) 1 Ch. L. 739 and *Griffiths v. Fleming*, (1909) 1 K. B. 805, *Expl.* [P 222 C 1]

S. Jagadisa Ayyar—for Petitioner.

S. Duraiswami Ayyar for *V. Sundararajan*—for Opposite Parties.

Judgment.—This is an application to show cause why the Official Trustee of Madras be not directed as Trustee of the petitioner herein to recover on her behalf of the amount due under Policy No. 6033 of R. Srinivasa Aiyar, deceased, effected with the United India Life Assurance Company and to pay the same to the petitioner. The petitioner, Abhiramavalli Ammal, is the widow of R. Srinivasa Aiyar who was the Head Master of Saint Antony's Secondary School, Negapatam. The petition is opposed by his two brothers. The late Mr. Srinivasa Aiyar insured his life for a sum of Rs. 1,000 with the United India Life Assurance Company, Madras. The policy so far as is material is as follows:

"This policy witnesseth that in consideration of the payment already made to the company as stated in the subjoined schedule the company doth hereby agree that, upon proof satisfactory to the directors of the happening of the event or events on which the sum assured is to become payable as described in the said schedule and the title of the person or persons who may be entitled to receive the same, it will pay the sum stated in such schedule as the sum assured to such person or persons."

The schedule to the policy stated inter alia the following particulars under the following headings:

Name, address and calling of the assured.	R. Srinivasan Esq., Head Master.
Amount	Rs. 1,000 only.
Sum assured } To whom payable	The assured or his wife Abhiramavalli if he predeceases her.

The petitioner's right to recover the amount is based on S. 6, Married Women's Property Act, 1874, which runs as follows :

"A policy of insurance effected by any married man on his own life, and expressed on the face of it to be for the benefit of his wife and children, or any of them, shall enure and be deemed to be a trust for the benefit of his wife, or of his wife and children or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband, or to its creditors or form part of his estate."

This language is in material particulars identical with the language of S. 10, English Married Women's Property Act, 1870. In England the Act of 1870 was repealed by the Married Women's Property Act, 1882. S. 11 of that Act corresponding to S. 10 of the previous Act and S. 6 of our Act is as follows :

"A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them; or by any woman on her own life, and expressed to be for the benefit of her husband or of her children or her husband and children, or any of them; shall create a trust in favour of the objects therein named; and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts."

It will be observed that in two particulars the terms of S. 11 of the Act of 1882, differ from the terms of S. 10 of the Act of 1870. The words "on the face of it" appearing in S. 10 are omitted in S. 11 of the later Act, and for the words "shall . . . be deemed to be a trust" appearing in S. 10 of the Act of 1870 we have the words "shall create a trust in favour of the objects therein named, etc.," in S. 11 of the Act of 1882.

Relying on S. 6, Married Women's Property Act, 1874, it is argued on behalf of the petitioner that by using the words that the sum is payable to "the assured or his wife Abhiramavalli if he predeceases her" it is expressed on the face of the policy that it is for the benefit of the wife of Srinivasa Aiyar if he predeceases her, and so, the policy "shall enure" and "be deemed to be a trust for the benefit" of the petitioner within the meaning of that section. On the other hand, the argument of the respondents is that the words used in the policy are not specific enough to show that it is expressed on the face of it that it is for the benefit of his wife and that the policy shall enure and be deemed to be a trust for her benefit within

the meaning of the section. According to this argument, in order that a policy may be deemed to be a trust in favour of the wife within the meaning of S. 6 of the Act it must appear on the face of the document in express words that the insurance was intended by the deceased for the benefit of his wife. I do not think that the language of S. 6 warrants the contention urged on behalf of the respondents. That section states that the policy shall on the face of it express that it is to be for the benefit of the wife and if it is so expressed, then it says the policy shall be deemed to be a trust for the benefit of the wife. There is nothing in the language of the section to show that the words "for the benefit of his wife" or other words corresponding to these should appear in the policy to enable us to infer a statutory trust in favour of the wife within the meaning of the section. If on reading the words used in the policy it appears that the assured has intended, in the event of his death, that the policy should enure to the benefit of his wife, then I think the policy may be deemed to be a trust for her benefit. I shall now consider how far the authorities brought to my notice support the respective contentions.

The only Indian decision bearing on the point occurs in *Srinivasachariar v. Ranganayaki Ammal* (1). In that case *R* insured his life in *S* company and died in 1914. Under the terms of the policy the amount assured was payable to *R* or to his wife in case of his death earlier. It was held that the sum insured did not form part of the deceased's estate but that the widow was the beneficiary who became entitled to the beneficial interest in that sum on her husband's death. The exact terms of the policy making the amount payable to the wife in the case of the husband's death do not appear in the judgment, but from the facts stated by the reporter it would appear that the terms were as general as the terms used in the present policy. This decision supports the petitioner. Another decision which supports the argument of the petitioner may be found in *re Fleetwood's Policy* (2), a decision under the English Act, 1882. In that case a husband took out an insurance policy for £500 on his life and by the terms of the policy the

(1) [1916] 32 I. C. 991.

(2) [1926] 1 Ch. D. 48=95 L. J. Ch. 195=1926 W. C. & Ins. Rep. 1=135 L. T. 374.

insurance company agreed to pay the sum to the insured's wife, if she were living at his death, or in the event of her prior death to pay it to the insured's executors, administrators, and assigns. It was held that the policy came within S. 11, Married Women's Property Act, 1882, and created a trust in favour of the wife in certain events. Though the words "for the benefit of his wife" did not appear in the terms of the policy, the learned Judge pointed out that

"the policy is, in the terms of the section a policy of assurance effected by a man on his own life, and expressed to be for the benefit of his wife."

Using similar language, I think we may say in this case that the language used in the policy "to the assured or his wife Abhiramavalli if he predeceases her" shows that it is a policy of assurance expressed to be for the benefit of his wife though the express words "for the benefit of his wife" do not appear in the terms of the policy. Mr. Duraiswami Aiyar for the respondents drew my attention to a series of cases under the English Act, 1870, the language of S. 11 of which, as I have already stated, is identical with that of S. 6 of the present Act. These cases are *In re Mellor's Policy* (3), *In re Mellor's Policy* (4), *In re Adam's Policy Trusts* (5), *In re Seyton v. Satterthwaite* (6), *In re M* (7) and *Griffith's Policy* (8). In all these cases the terms of the policy contained the words "for the benefit of his wife." On the strength of these decisions it is contended that, unless these words appear on the face of the policy, the policy cannot be deemed to be a trust within the meaning of S. 6 of the Act. I do not think this conclusion necessarily follows from these decisions. Of course, if these words appear on the face of the policy, then there can be no difficulty at all with regard to the solution of the question whether a statutory trust in favour of the wife has been created or not; but these cases do not say that, unless these words are used, no statutory trust within the meaning of the section can be

inferred. It is well known that in England documents are drawn up with greater precision than in this country. It is clear that in the cases referred to the draftsman, to avoid all difficulties of construction have obviously introduced the very words of the statute in the documents themselves. If a similar procedure is adopted in India also by insurance companies in drawing up the terms of the policy in cases where the assured intends to create a trust in favour of his wife in the event of his death, there will be no scope for arguments like the one now urged on behalf of the respondents. In *Griffiths v. Fleming* (9) a case strongly relied on by Mr. Duraiswami Aiyar, a husband and his wife effected with an Insurance Association a policy whereby, in consideration of a premium of which each paid a part, a sum of money was made payable upon the death of whichever of them should first die to the survivor. The wife having died, the husband brought an action upon the policy to recover the policy money. Under the heading "the amount . . . to whom payable" in the policy it was stated "£500 to the survivor of the grantees." It was argued against the contentions of the husband's counsel by Sir John Simon, K. C., that to come within S. 11, Married Women's Property Act, 1882 :

"the insurance must comply strictly with its terms and must be expressly for the benefit of one or more of the objects therein named."

This argument found favour with Vaughan Williams, L. J. But Kennedy, L. J., with whom Farwell, L. J., concurred, did not accept it. This case is more an authority for the petitioner than one for the respondents. In this connexion I may state that having regard to the second point of difference between the language of S. 11 of the English Act, 1882, and the language of S. 10 of the Act, 1870 which I have already pointed out, the argument advanced in the English cases is somewhat plausible; but the language of the Indian Act is identical with the language of the English Act, 1870, which in my opinion does not lend any support to the respondents' arguments.

For the above reasons I hold that the terms of the insurance policy in the present case fall within the language of S. 6, Married Women's Property Act, 1874, and so a statutory trust in favour of the

(3) [1877] 6 Ch. D. 127.

(4) [1878] 7 Ch. D. 200=47 L. J. Ch. 246=26 W. R. 309.

(5) [1883] 23 Ch. D. 525=52 L. J. Ch. 642=48 L. T. 727=31 W. R. 810.

(6) [1887] 34 Ch. D. 511=56 L. J. Ch. 775=56 L. T. 479=35 W. R. 373.

(7) [1899] 1 Ch. D. 79=68 L. J. Ch. 86=79 L. T. 459=47 W. R. 267=5 T. L. R. 54.

(8) [1903] 1 Ch. D. 739=72 L. J. Ch. 330=88 L. T. 547.

(9) [1909] 1 K. B. 805=78 L. J. K. B. 567=100 L. T. 765=53 S. J. 340=25 T. L. R. 317.

petitioner has been created under the Act. She is therefore entitled to claim the money. Her prayer in the petition is granted with costs which I fix at Rs. 75.

P.R.S./B.V.

Petition granted.

A. I. R. 1932 Madras 223

ANANTAKRISHNA AYYAR, J.

(*Polavarapu*) Ankayya—Defendant—Petitioner.

v.

(*Gaddamanugu*) Subhadrayya and others—Plaintiffs—Opposite Parties.

Civil Revn. Petns. Nos. 546 and 656 of 1928, Decided on 15th July 1931, against order of Sub-Judge, Bezwada, in Misc. Appeal Suit No. 10 of 1927.

(a) Civil P. C. (1908), S. 148—Applicability.

Section 148 does not apply where time is allowed for doing an act by the decree in a suit: 39 *Mad.* 876, *Ref.* [P 223 C 2]

(b) Civil P. C. (1908), S. 115—Court having inherent powers to grant certain kind of application and not doing so as wrong section quoted while filing it—High Court should grant revision of order on that application.

Courts should not consider an application only with reference to the section under which it is purported to be filed. If Courts have got inherent power to entertain an application and grant the relief prayed for therein, the circumstance that a wrong section is quoted should not be taken too much into account when the High Court is asked to exercise its powers of revision in such matters: 29 *Mad.* 370, *Rel. on.*; A. I. R. 1926 *Mad.* 1059; A. I. R. 1924 *Mad.* 586 and 16 *Mad.* 424, *Ref.* [P 224 C 1, 2]

P. Satyanarayana Rao — for Petitioner.

G. Lakshmananna and G. Chandrasekhara Sastri—for Opposite Parties.

Judgment.—These are two revision petitions filed by defendant 2 in O. S. No. 446 of 1925 on the file of the District Munsif of Bezwada. O. S. No. 446 of 1925 instituted by the plaintiff Subhadrayya was allowed on 7th April to be withdrawn with permission to bring a fresh suit, but he was directed to pay costs of defendant 2 (the petitioner before me) on or before 7th May 1926.

The material portion of the order is as follows:

"the plaintiff will pay defendant 2's costs Rupees 56-4-0 incurred till now within one month from this date and that in default the suit will stand dismissed with costs."

The costs were as a matter of fact paid, on 8th May 1926, into Court. It will be noticed that it was just one day too late having regard to the time mentioned in the decree. The plaintiff therefore filed an application in the District Munsif's

Court purporting to be under S. 148, Civil P. C., asking the Court to extend the time mentioned in the decree for payment of defendant 2's costs. That application was dismissed on the ground that the Court had no jurisdiction to extend the time under S. 148 of the Code. Subsequently the plaintiff applied again to the District Munsif for extension of time, the application taking the form of an application to review the prior order passed by the District Munsif. The plaintiff quoted the decision in *Periamuthirian v. Karuppanna Muthirian* (1) as an authority for the position that the Court could in such cases grant the prayer for extension of time. The District Munsif held on this occasion that he had power, and on the merits came to the conclusion that a proper case had been made out for granting the review and extending the time. Against that order defendant 2 preferred an appeal to the Subordinate Judge's Court at Bezwada. The Subordinate Judge held that in the circumstances no appeal lay to his Court, and that defendant 2's remedy if any was to apply to the High Court. He accordingly dismissed the appeal but made no order as to the costs of the appeal. Defendant 2 has accordingly filed two revision petitions to the High Court, Civil Revn. Petn. No. 556 of 1928 being against the order passed by the Subordinate Judge on appeal and Civil Revn. Petn. No. 656 of 1928 being against the order passed by the District Munsif on the second occasion.

On behalf of defendant 2 his learned advocate argued that having regard to the provisions of S. 148, Civil P. C., the present is not a case where the plaintiff could apply to the Court for extension of time under S. 148. He drew my attention to the fact that the decree in the present case is a self-contained one. It mentioned in the very first instance the amount of costs that the plaintiff has to pay to defendant 2, and it also mentioned the time within which the said costs should be paid; and the decree proceeded further to state that in case costs be not so paid the suit shall stand dismissed. I agree with the learned advocate for the petitioner that S. 148 does not apply where time is allowed for doing an act by the decree in a suit. It is not necessary to mention authorities; *Dharmaraja*

(1) [1906] 29 *Mad.* 370.

Ayyar v. Srinivasa Mudaliar (2), is sufficient for the purpose. In fact as I said, the learned advocate for the plaintiff-respondent conceded before me that that proposition could not, at present, be contested.

The argument of the learned advocate for the plaintiff-respondent was that in substance the two applications filed by the plaintiff, chiefly the second of them, should be viewed not with reference solely to the section under which they were purported to be filed, but with reference to the substance of the same, and he laid stress on the point that, having regard to the fact that *Periamuthirian v. Karuppanna* (1) is quoted in the second of the petitions, the same must be taken to be an application to review the decree in the case itself; and he referred me to the decisions in *Narayanaswami v. Natesa* (3), *Joseph Brito v. Mrs. Brito* (4) and *Krishnamacharlu v. Venkata Subbiah* (5), in support of his contention. I must admit that I had great difficulty in coming to a conclusion whether the plaintiff had properly approached the Court to exercise in the circumstances the jurisdiction to exercise the leniency which the District Munsif has in fact shown to him. In the first place, the first application filed by him under S. 148 is not one which could possibly be complied with by the Court. No doubt, as I have already mentioned, Courts should not consider an application only with reference to the section under which it is purported to be filed.

The difficulty that I was feeling all along has been as to what is the effect of the second application which purported to be an application to review the order passed on the first application. But having regard to the fact that *Periamuthirian v. Karuppanna* (1) is mentioned and having regard to the real and obvious request in these applications namely, that the decree in the suit has to be reviewed and the time extended, I have, after some hesitation, come to the conclusion, in this case, remembering that I should regard the real substance of the application and not be guided solely by the section quoted in the same. In this case, it is clear that the Court had the jurisdiction to review the decree. If

Courts have got inherent power to entertain an application and grant the relief prayed for therein, the circumstance that a wrong section is quoted should not be taken too much into account when the High Court is asked to exercise its powers of revision in such matters. Having regard to the fact that on the merits the District Munsif himself was satisfied that a case for review had been made out and that the delay was only one day (the allegation being that the chalan was received only on the last day and that before the money could be paid into the bank it was too late), I think that I would be allowing technicality to govern my decision at the sacrifice of justice if I were to interfere in revision in this case. *Joseph Brito v. Mrs. Brito* (4) supports the view taken by me. But I am clear that the plaintiff should be made responsible so far as the costs of these applications are concerned.

I confirm the order passed by the District Munsif on 24th January 1927 which I construe to be passed by way of review of the decree in O. S. No. 446 of 1925, extending the time mentioned in that decree. I direct that these two revision petitions do stand dismissed, but that the plaintiff-respondent before me should pay the costs of defendant 2 in I. A. No. 1476 of 1926 and in this Court. Having regard to what I have said, no further orders are necessary in Civil Revn. Petn. No. 546 of 1928 which will be simply dismissed without any order as to costs.

P.R.S./B.V.

Order accordingly.

A. I. R. 1932 Madras 224

CURGENVEN, J.

S. P. R. M. Ramasami Chettiar—Defendant—Petitioner.

v.

(Raja Sreemathu) Muthu Vijaya Raghunatha Doraisingam—Plaintiff—Opposite Party.

Civil Revn. Petn. No. 864 of 1928, Decided on 15th October 1931, from decree of Sub-Judge, Ramnad, in S. C. S. No. 58 of 1927.

Provincial Small Causes Courts Act (1887), Art. 13—Suit for poruppu is cognizable by Court of Small Causes.

Poruppu is not a class of allowance or fee contemplated by Art. 13 and a suit for poruppu is cognizable by a Court of Small Causes: 21 *Mad.* 243; *A. I. R.* 1927 *Mad.* 931 and 17 *M. L. J.* 487, *Rel. on.*

(2) [1916] 39 *Mad.* 876=31 *I. C.* 240.

(3) [1893] 16 *Mad.* 424.

(4) *A. I. R.* 1924 *Mad.* 586=75 *I. C.* 888.

(5) *A. I. R.* 1926 *Mad.* 1059=97 *I. C.* 795.

V. Ramaswami Ayyar—for Petitioner.
K. Kuttikrishna Menon—for Respondent.

Judgment.—The suit was for poruppu and cesses, and the only question here is whether it was cognizable by a Small Cause Court. The learned Subordinate Judge who tried it as a small cause has answered the question in the affirmative and I can find no reason to differ from his conclusion. He is obviously right in saying that the so-called cesses were not collected by the zamindar as cesses but it was really money with which he reimbursed himself for payment of cesses on behalf of the defendants. I do not think that poruppu is a class of allowance or fee contemplated by Art. 13, Sch. 2, Provincial Small Causes Courts Act. There is very little doubt that its equivalent in other parts of the Presidency is jodi or kattubadi, being a favourable quit rent charged upon lands granted for various reasons [see Sundararaja Ayyangar's *Land Tenures in the Madras Presidency*, Edn. 2, p. 206], and there is direct authority in *Venkatagiri Rajah v. Venkat Rau* (1), that a suit for jodi is cognizable by a Small Cause Court. There are other cases, such as *Mosafkanni Ravuther v. Doraisingam* (2) and *Seetharama Ayyar v. Fischer* (3), which related to small cause suits for such claims in which the matter was not even raised but seems to have been taken for granted. I think accordingly that the finding is correct and I dismiss the civil revision petition with costs.

P.R.S./R.M. *Petition dismissed.*

(1) [1898] 21 Mad. 243.

(2) A.I.R. 1927 Mad. 931=105 I.C. 179.

(3) [1907] 17 M. L. J. 487.

A. I. R. 1932 Madras 225

CURGENVEN, J.

Appasami Ayyangar—Defendant—Petitioner.

v.

Krishnaswami Padayachi—Plaintiff—Opposite Party.

Civil Revn. Petn. No. 1386 of 1928, Decided on 4th November 1931, from decree of Small Cause Court Judge, Kumbakonam, D/- 7th March 1928, and passed in Small Cause Suit No. 2718 of 1927.

Limitation Act (1908), Arts. 97 and 116—Lease—Lessor failing to give possession to lessee—Suit by lessee for refund of advance—Time runs from inception of lease.

Where a lessor has received a certain sum in advance as a part of the rent of the property leased, but fails to deliver possession of the pro-

perty to the lessee, and where the lessee sues for the refund of the advance, time begins to run from the date of the lease: 40 *Mad. 910, Rel. on.* [P 225 C 2, P 226 C 1]

C. A. Seshagiri Sastri—for Petitioner.
Aravamuthan—for Opposite Party.

Judgment.—The defendant leased some property to the plaintiff for a period of seven years, to run from 1st July 1920 to 30th June 1927. The lessee gave the lessor an advance of Rs. 200 which under the terms of the lease was to be adjusted towards the last year's rent, that of 1926-27. The plaintiff in point of fact was not given possession of the property and he accordingly sued for the return of the advance and for damages. We are only concerned with the advance, in respect of which the learned Judge of the Small Cause Court has given the plaintiffs a decree. The plea of limitation was raised and was decided in his favour, though upon what grounds is not clear, as the learned Judge of the Small Cause Court has merely given his decision to that effect without reasons. In this revision petition the point is taken that the claim was barred by limitation, it being urged that there was a breach of the covenant to lease as soon as failure occurred to let the plaintiff into the land, and accordingly that whether Art. 97 or Art. 116, Limitation Act applies time began to run from that date (1st July 1920), and the suit which was brought on 27th June 1927 is accordingly out of time.

In *Secy. of State v. Venkayya* (1), the question has been discussed by the late learned Chief Justice and Srinivasa Iyengar, J., as to the effect of a failure on the part of the lessor to give possession to his lessee upon the due date, and it was held that the breach of a covenant so to give possession is not a continuing breach, as for instance would be the breach of a covenant for quiet enjoyment, but that it occurs once and for all at the inception of the term as soon as failure to comply with the terms of the lease in this respect takes place. That case related to a claim for damages. But I am unable to see in what respect a claim for the return of an advance made in the circumstances above stated would differ from such a claim, and it appears to me that as soon as the lessor failed on 1st July 1920 to give possession to his lessee it was open to the latter to sue for the return of the advance made, and ac-

(1) [1917] 40 *Mad. 910*=35 I. C. 254.

Accordingly that time would run against him in this respect as much as if his suit were one of damages. I have been asked to hold that S. 39, Contract Act, enables a promisee to put an end or not to put an end to a contract which his promisor has refused to perform, and it is true that if the plaintiff here had produced evidence that he had agreed to take delivery of the land on some later date he probably could not have sued either for damages or for the return of the advance and time accordingly might not have run against him until it appeared that he had given up any express intention to take over the land. No such consideration arises in the present case, and I must accordingly conclude that time ran against him from the date of the inception of the lease and the claim is accordingly time barred. I therefore allow the civil revision petition and set aside the decree of the lower Court and dismiss the suit with costs in both Courts.

P.R.S./B.V.

Revision allowed.

A. I. R. 1932 Madras 226

JACKSON, J.

Raman Chetti and others—Plaintiffs—Appellants.

v.

The Taluk Board of Sivaganga—Defendants—Respondents.

Second Appeals Nos. 508, 507 and 509 of 1929, Decided on 8th October 1931, against decrees of Sub-Judge, Sivaganga, in A. S. No. 153 and 154 of 1927 and A. S. No. 17 of 1928.

(a) Provincial Small Causes Courts Act (1887), Sch. 2, Cl. 19—Suit for recovery of money alleged to be unlawfully collected by Taluk Board as profession tax is suit of small cause nature.

A suit for recovery of Rs. 125 alleged to have been unlawfully collected by a Taluk Board from the plaintiff by way of profession tax is a suit of small cause nature and a money decree in such a suit does not become a declaratory decree because the judgment is prefaced by some sort of declaration: 39 *Mad.* 219; 17 *I.C.* 704 and 23 *Bom.* 266, *Ref.* [P 226 C 2]

(b) Madras Local Boards Act (1920), S. 93—Person staying in British India and deriving his income from money transactions in Burma, receives money in British India and is liable to profession tax.

Where a person residing within the local limits of a Taluk Board, derives his income from money transactions in Burma, and the money is transmitted to him within the local area of the Board, he is liable to pay profession tax to the Board.

The governing factor in such a case is that in fact the income was or was not so received: *A. I. R.* 1926 *Mad.* 1048 (*F.B.*); *A. I. R.* 1923 *Mad.* 574 (*F.B.*) and *A.I.R.* 1921 *Bom.* 159, *Ref.* [P 227 C 1]

T. M. Krishnaswamy Ayyar and N. Sivaramakrishna Ayyar — for Appellants.

V. Ramaswami Ayyar — for Respondents.

Judgment. — Suit for Rs. 125 (and interest), the sum alleged to have been unlawfully collected by the defendant, the Taluk Board of Sivaganga, from the plaintiff by way of profession-tax. The lower appellate Court dismissed the suit and plaintiff appeals.

Defendant takes a preliminary objection that this suit being of a small cause nature no second appeal lies.

I think that the objection must be upheld. The amount sued for brings the suit within the small cause category, and the decree that is sought is not a mere declaratory decree. Mr. T. M. Krishnaswamy Ayyar argues for appellant that the decree for money cannot be obtained until the order of the Taluk Board is cleared away by way of declaration. But that is not the governing factor. A party who sues for money has usually to establish or to clear away something, and his money decree does not become a declaratory decree because the judgment in his favour is prefaced by some sort of declaration. In *Rajammal v. Narayanaswamy Naicker* (1) a defeated claimant had first to get the Court's summary order set aside before he could obtain the return of his property, but none the less it was held to be a suit of a small cause nature.

In *Veeraraghava Ayyangar v. Vellai Mooppai* (2) it is also pointed out that an incidental declaration prefatory to the return of money does not except a suit from the cognizance of a Court of Small Causes. In the present suit the decree which the first Court passed is a simple money decree with no declaration. And even if there had been a declaration it would still not have been a declaratory decree within the mischief of sub-Cl. 19, Sch. 2, Act 9 of 1887, because it would not be a mere declaration to quote the term used in *Rajammal v. Narayanaswamy Naicker* (1): "A declaratory suit properly so called is a suit of the nature described in S. 42, Specific Relief

(1) [1916] 39 *Mad.* 219=29 *I. C.* 908.

(2) [1912] 17 *I. C.* 704.

Act : *Raghunath Mukund v. Scroosh K. R. Kama* (3), at p. 270."

I hold that no second appeal lies.

However the case has been argued on the merits. The plaintiff is a Chetti residing within the local limits of the defendant Board, and deriving his income from money transactions in Burma. It is argued on his behalf that he is not within the local area in receipt of any income from money-lending. Though he may have earned such income outside the local area, its transmission to him within the area does not amount to receiving income, because it is not receiving and not income. This is largely based upon *Sundar Das v. Collector of Guzarat* (4), where the curious circumstance is contemplated of a man earning money in Baluchistan and carrying it over the border into British India or himself transmitting it there. But if he receives the money from his agents there seems no necessity to go to the Oxford Dictionary to see whether he receives it, for an ordinary parlance he undoubtedly does. In such circumstances *Commr. of Income-tax, Madras v. Nedungadi Bank, Calicut* (5), is clear authority that the money is received; and in *Board of Revenue v. Ripon Press and Sugar Mill Co.* (6), the governing factor is that in fact the income was not so received. In this ruling it is nowhere suggested that it is immaterial whether the money was ever received in British India or not. So too in *Aurangabad Mill Ltd., In re* (7).

Then it is argued that if an agent in Burma receives the income of the firm, and transmits it to the proprietor in India, even though the proprietor may receive it, it is not income, but only money remitted. I find no authority for this subtlety. Obviously the plaintiff in this case has an income, and it is idle to say for the purpose of the Local Boards Act that he is living not on his income but on transmitted money.

It is curious to note that in these local Acts a man is taxed on the quality and quantity of his receipts, not on his expenditure. Two men may occupy houses of the same size, drive in identical motor

cars and enjoy the amenities of the Board to exactly the same extent; but while the man whose income is from money-lending outside the locality pays a profession-tax, the man whose income is from rentals outside the locality under the present Act goes scot-free. However that circumstance has no bearing upon the present suit which is under the 1920 Act.

On both grounds the appeal fails and is dismissed with costs.

Connected Appeals Nos. 507 and 509 must be dismissed for the same reason with costs.

P.R.S./R.M.

Appeal dismissed.

* * A. I. R. 1932 Madras 227

VENKATASUBBA RAO AND WALSH, JJ.

Panyam and another—Plaintiffs—Appellants.

v.

Avadhanam Rama Lakshamma and another—Defendants—Respondents.

Appeal No. 160 of 1930, Decided on 22nd October 1931, against decree of Sub-Judge, Kurnool, in O. S. No. 25 of 1927.

* * (a) **Hindu Law—Adoption—Widow's power to adopt is dependent on whether spiritual purpose of son would be satisfied or not and not on question whether some estate is or is not devested.**

B, a male Hindu died leaving behind him a widow *W* and his daughter *D*. *W* died and *D* became the owner of *B*'s property. *D* became a widow soon after she was married and after a very long time adopted a son with the consent of her husband's agnates. *D*'s husband died when he was a member of a joint family, and after his death a partition took place amongst the members of the family. *D* had adopted a boy after this partition. After the adoption by *D*, the reversioners of *B* sued for a declaration that the adoption after the partition was invalid on the ground that *D*'s power to adopt was then extinguished and hence the adoption did not bind them.

Held: that a widow's power to adopt was limited by and was dependent on the question whether the spiritual purpose of a son would be satisfied or not, and not on the question whether some estate was or was not devested. The widow's power to adopt had not come to an end and the adoption was valid. The validity of an adoption must be judged intrinsically on its own merits and not with reference to considerations extraneous to it: 1 *Mad.* 69; 49 *I. C.* 929 and *A.I.R.* 1918 *P.C.* 74, *Expl.* (Case law discussed.)

[P 230 C 2; P 232 C 1]

(b) **Practice—New plea—Point not raised in pleadings nor referred to in lower Court's judgment cannot be raised in appeal.**

An important point, not raised in the pleadings in the lower Court, nor referred to in the judgment of the lower Court, cannot be allowed to be raised for the first time in either first or second appeal.

[P 232 C 2]

(3) [1899] 23 Bom. 266.

(4) *A. I. R.* 1923 Lah. 14=77 *I. C.* 616=3 Lah. 349 (F.B.).

(5) *A. I. R.* 1926 Mad. 1048=98 *I. C.* 1=49 Mad. 910 (F.B.).

(6) *A. I. R.* 1928 Mad. 574=77 *I. C.* 621=46 Mad. 706 (F.B.).

(7) *A. I. R.* 1921 Bom. 159=64 *I. C.* 9=45 Bom. 1286.

B. Somayya—for Appellant.

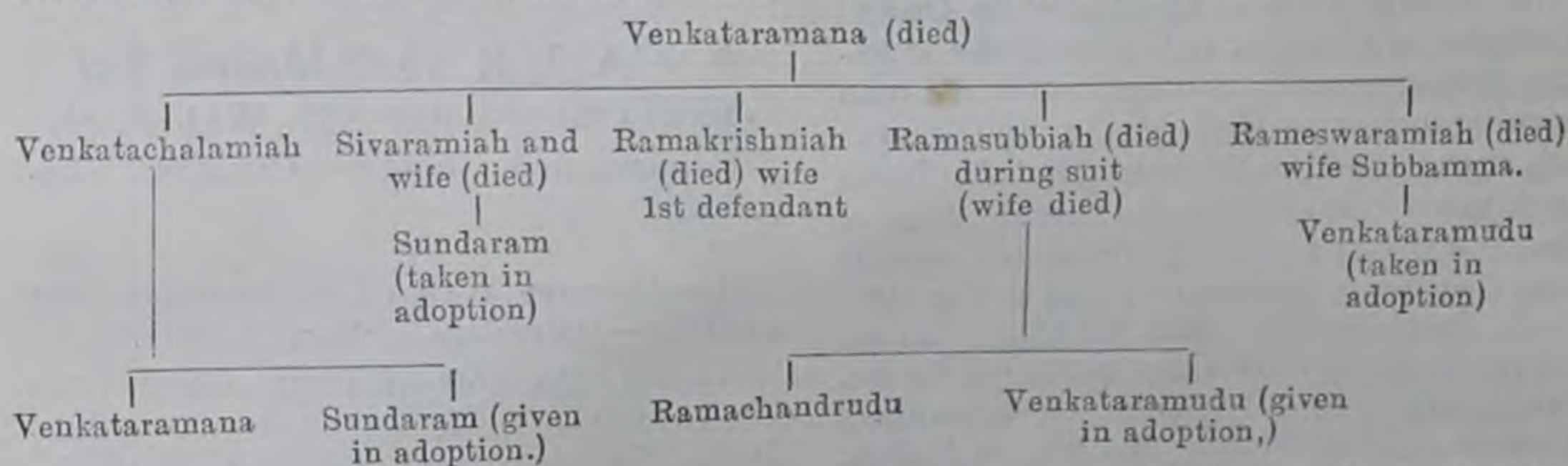
W. Kothandaramayya—for Respondent.

Venkatasubba Rao, J.—This appeal raises an important question relating to the law of adoption not covered by any direct authority. The plaintiffs are the reversioners to the estate of one Bhaskarayya. He died leaving him surviving his widow, Chidambaramma, and his only daughter, Ramalakshamma defendant 1. After the death of his widow, Bhaskarayya's properties devolved on defendant 1. It is stated in the plaint that soon after the latter's marriage, more

than 40 years ago, she became a widow, while still under age. In the year 1922, defendant 2, a distant agnatic relation of her father, was taken by her in adoption. The plaintiffs attack the adoption as being invalid and pray for a declaration that their reversionary right is not affected by it.

For understanding the objection taken to the adoption, we must turn to the pedigree, which sets forth her husband's relations, although the last full owner of the estate in question was her father and not her husband.

The pedigree is as follows:



Ramakrishnayya the husband of defendant 1, died about 1892 when the family was joint. But there was subsequently a partition among the members of the family. It is admitted that the adoption was made after that partition and the contention advanced for the plaintiffs is, that with the extinction of the joint family, the widow's power to adopt came to an end and became incapable of execution. It is worthy of note that before making the adoption, she obtained the consent of all her husband's agnates. But it is argued for the plaintiffs, that the power having once come to an end it cannot be subsequently revived by consent. The lower Court, holding that the widow's power did not become extinguished and that the adoption was therefore valid, dismissed the suit.

The question argued before us is: What is the proper limit to the exercise of the widow's power? According to the plaintiffs, the limit is reached when the adoption divests an estate vested in a third party. Thus the widow of a separated husband can adopt either when she takes his estate from him immediately or as heiress of her son who surviving his father dies subsequently. In these two cases, the adoption cannot divest any estate other than that vested in the adopting

widow herself and this is said to be the reason for the adoption being treated as valid. Applying this rule, if on the son's death, his estate vests in his widow or his son, the original widow's power comes to an end; and on the principle that what is gone cannot be revived, she is forbidden to adopt, even though she succeeds to the estate on the death of the son's nearer heir. So much then for an adoption to a separate Hindu.

Now turning to the case of a joint family, the widow of a deceased member can adopt, provided the family is still joint when the adoption is made; for what is defeated by the adoption is not an absolute estate, the vesting in the survivors being only provisional. On this principle, it is argued that if the coparcenary becomes extinct, either because the surviving members have come to a partition, or because the joint property has passed by succession from the last survivor to his heirs, the power to adopt becomes exhausted and is incapable of execution.

These rules Mr. Somayya, the plaintiffs' learned counsel, contends, are deducible from the decisions on the subject. The adoption in question, if allowed, would defeat the estate taken by the survivor

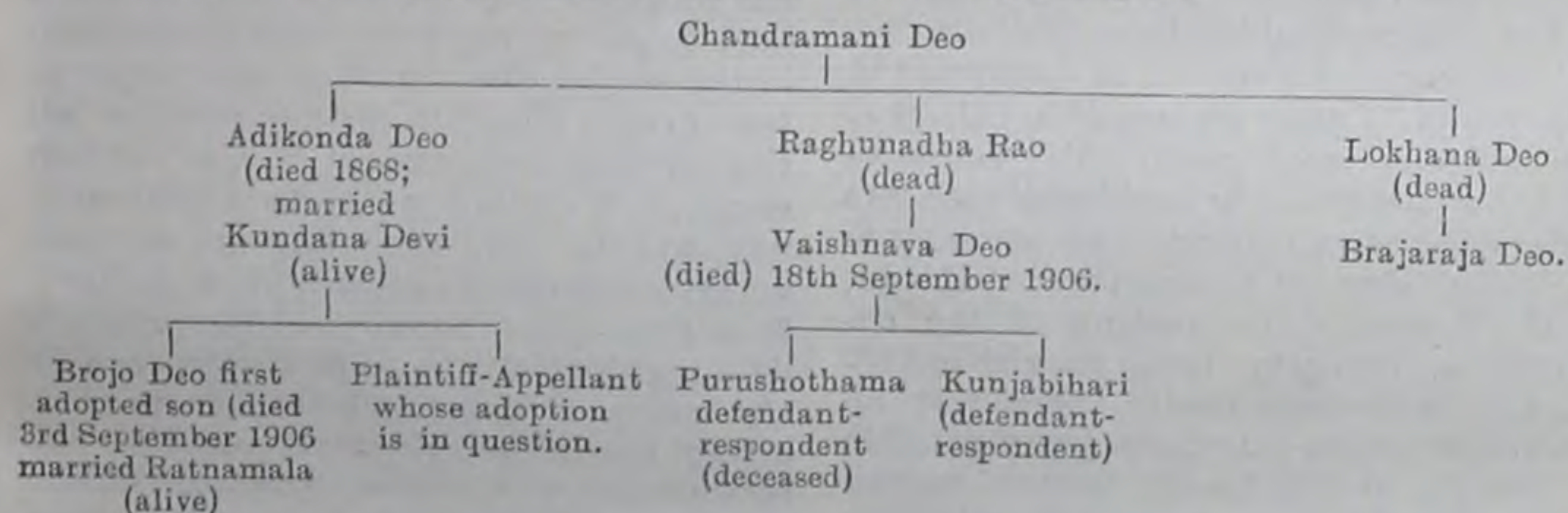
absolutely on partition. On that ground it is impeached as being invalid.

The test then of the principle defining the limit, which Mr. Somayya deduces from the numerous cases referred to by him in his lucid and exhaustive argument depends upon whether the adoption divests or not the estate vested in a third party. Whether a Hindu dies leaving a son or not, or whether he had no son ever born to him at all (as in the present case), is if this be the true test, an irrelevant consideration. According to Mr. Kodandaramayya, the defendant's learned advocate, the decisive factor is not, whether some estate is or is not divested, but whether the adoption being in essence a religious act, the spiritual purposes of a son have been satisfied. He contends, that if the effect of invalidating an adoption would be to deprive a Hindu father

of the services of a competent son the result would be repugnant to the spirit of the Hindu law. The test of the limiting principle, according to him, is that laid down by the Full Bench in the judgment of Chandavarkar, J., in *Ramakrishna v. Shama Rao* (1) namely:

"Where a Hindu dies, leaving a widow and a son, and that son himself dies leaving a natural born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never afterwards be revived."

Both sides have relied upon the decisions of the Privy Council, and the question is: What is the correct test that is deducible from them? There are two cases decided by the Board relating to the same estate, which throw a good deal of light on the point. Let us take the following pedigree:



On the death of Adikonda, a member of a Hindu joint family, his brother Raghunatha took possession of the zamindari. Kundana Devi, acting on her husband's authority, adopted Brojo Deo. The adopted son filed a suit to recover the zamindari from Raghunatha and the Privy Council, holding his adoption valid, upheld his claim. These are the facts of *Virada Pratapa Raghunadha v. Brojo Kishore* (2), (the first *Chinnakimedi* case). Then certain further events happened and the same estate came up again before the Privy Council. Brojo, the adopted son, recovered possession and died about 30 years afterwards leaving his widow Ratnamala but no son. Possession of the zamindari was then taken by Vaishnava Deo who was in his turn succeeded by his son Purushothama. The widow of Adikonda purported to make a second adoption to her husband by adopting the person shown as the plaintiff in the pedi-

gree. The latter thereupon claiming the zamindari filed a suit for recovering it. The Judicial Committee, holding that the adoption was bad, dismissed the suit. These are the facts of *Madana Mohana v. Purushothama* (3) (the second *Chinnakimedi* case). Do these decisions support the theory put forward by Mr. Somayya? On both the occasions, the adopting widow belonged to a joint family. Her first adoption was held good, but the second bad. Mr. Somayya suggests that in the first case the family being a joint one, the vesting of the joint family property was only provisional and that therefore the adoption was upheld. This contention is obviously wrong, for although the family was joint, the zamindari being an impartible one, was held in severalty and not in co-parcenary. On Adikonda's death, it did not pass to the surviving members, but to a single heir, Raghunatha. His succession was no doubt in a sense provi-

(1) [1902] 26 Bom. 526=4 Bom. L. R. 315.

(2) [1876] 1 Mad. 69=3 I.A. 154=3 Sar. 583.

(3) A. I. R. 1918 P.C. 74=46 I. C. 481=45 I.A. 156=41 Mad. 855 (P.C.).

sional as stated by the Judicial Committee, but it was not provisional in the sense that a co-parcener's share is liable by fluctuation to increase or diminish. The point to note is, that the adoption was held valid in spite of the fact that Raghunatha was thereby divested. Now, turning to the second case, was the adoption by Kundana Devi held invalid on the ground that it would divest Purushothama? His succession, like that of his predecessor, Raghunatha, was in a sense provisional, for it was "subject to defeasance by the emergence of a male heir" to the last full owner, who however was not Adikonda but Brojo Deo. In other words, if the adoption had been made by Ratnamala, on the very grounds stated by the Privy Council, it would have been upheld (granting it was otherwise valid). That this is the effect of the decision is shown by the judgments of Sir John Wallis, C. J., and Seshagiri Aiyar, J., in *Jagannadha Gajapati v. Kunja Bihari Deo* (4), (the third *Chinnakimedi* case). Mr. Somayya says that the first *Chinnakimedi* case was understood as validating an adoption made by the widow of an unseparated Hindu, on the ground of the vesting of the coparcenary property being provisional although, in the case itself, there was no reference to the existence of any partible property. If that be so, in the second *Chinnakimedi* case also, the adoption should have been held valid; But he suggests that this case is generally regarded as having established a new principle. He is constrained to put forward this argument, as otherwise, his theory, that the divesting rule furnishes the limiting principle, must fall to the ground. If, on the other hand, the principle contended for by Mr. Kodandaramayya is accepted, these two decisions become perfectly reconcilable. What distinguishes the first from the second case is, that in the latter, Brojo died

"after attaining full legal capacity to continue the line either by the birth of a natural son or by the adoption to him of a son by his own widow."

It must not be forgotten that in the passage immediately preceding these words, their Lordships expressly affirm and approve the principle enunciated by Chandavarkar, J., in *Ramakrishna v. Shama Rao* (1). These words therefore mean neither more nor less than the pas-

sage already quoted by us from Chandavarkar, J.'s judgment.

Madana Mohan v. Purushothama (3), (the second *Chinnakimedi* case) bears a close resemblance to *Bhoobun Moyee v. Ram Kishore* (5), which is referred to and followed in the previous case. Gaur Kishore died leaving Bhavani Kishore, his only son, and his widow Chandraboli. On Bhavani Kishore's death leaving Bhoobun Moyee as his widow, Chandraboli purported to take in adoption Ram Kishore. The Judicial Committee held that adoption bad. The only difference (and that is immaterial) between this and *Madana Mohan v. Purushothama* (3), is, that whereas in the first case, the son (Bhavani Kishore) was a natural son, in the second, he (Brojo Deo) was an adopted son. In both the cases, as we have pointed out the adoption was declared invalid. We have examined the grounds of the decision in the second case. Let us now turn to the first. Their Lordships refer to "all the spiritual purposes of a son" which would, in a certain event, have been satisfied and to "all the religious services, which a son could perform for a father." The true test therefore of the principle defining the limit, is to be sought not in the rule of divesting or otherwise of an estate, but in the rule that requires the continuance of a person to perform all the requisite religious services. The line must be drawn somewhere in applying this principle and it must be taken as established, that the limit is reached on the happening of the event mentioned in the judgment of Chandavarkar, J.

In some decisions of the Judicial Committee, such as, *Bhoobun Moyee v. Ram Kishore* (5), already cited, and *Venkata Krishna Rao v. Venkatarama Lakshmi Narasayya* (6), there are no doubt observations adverting to the divesting rule; but the principle of divesting must not be taken as having furnished the ground of decision, but the divesting or otherwise of the estate must be understood as having been referred to as the result of the adoption being held either good or bad. That their Lordships always laid stress on the religious aspect of the act of adoption appears from several cases. In the Ramnad case, *Collector of Madura v.*

(5) [1865] 10 M. I. A. 279=3 W. R. 15 (P.C.).

(6) [1876] 1 Mad. 174=4 I. A. 1=25 W. R. 21 (P.C.).

(4) [1919] 49 I. C. 929.

Ramalinga Sethupathy (7), their Lordships describe it as a meritorious act and refer to "the existence of a direct line competent to the full performance of religious duties" and to the

"religious obligation to adopt a son in order to complete or fulfil defective religious rites."

The following observations of their Lordships in the *Chinnakimedi* case, *Sri Raghunatha v. Sri Brojo Kishore* (2), are pertinent to the matter in hand:

"They may however observe that a distinction which is founded on the nature of property seems to belong to the law of property, and to militate against the principle which Holloway, J., has himself strenuously insisted upon elsewhere. (1), viz., that the validity of an adoption is to be determined by spiritual rather than temporal consideration; that the substitution of a son of the deceased for spiritual reasons is the essence of the thing, and the consequent devolution of property a mere accessory to it."

It is unnecessary to refer to the more recent Privy Council cases beyond stating that in *Pratap Singh v. Agar Singhji Raisingji* (8), the principle laid down in *Bhoobun Moyee v. Ram Kishore* (5), and *Madana Mohan v. Purushothama* (3), has been reaffirmed. Incidentally, it may be remarked that in that case *Pratap Singh Shivsingh v. Agarsingji Raisingji* (8), the fact that the adoption would detract from the plaintiff's right, did not stand in the way of the adoption being held valid, on the ground that the power had not become exhausted. The result then of this examination of the Privy Council cases is that when properly understood, they do not bear out Mr. Somayya's contention. See the judgments of Reilly, J., in *Suk Dev Das v. Mt. Choti Bai* (9), of Oldfield, J., in *Venkataramier v. Gopalan* (10), and of Kumaraswami Sastri, J., in *Maharaja of Kolhapur v. Sundaram Ayyar* (11), at pp. 209 to 214 (of 48 Mad.).

Mr. Somayya has referred us to numerous decisions of the Indian Courts, where the adoption by a widow was held invalid, although the result of so holding would be that her deceased husband would never have had any male issue to continue his line. As typical of these cases may be mentioned *Adivi Suryaprakasa Rao v. Nidamarthy Gangaraju* (12), *Chandra v.*

Gojara Bai (13), and *Sri Dharneedar v. Chinto* (14). There are cases, where the widow's deceased husband was an unseparated Hindu, but by the time she made the adoption, the joint property had passed by succession from the last survivor to his heirs. The reason for holding the adoption invalid was, that when the estate vested in the heir, the power of the widow came to an end. Whether these decisions, though in conflict with the principle affirmed by the Judicial Committee, will, so far as they go, be followed or not on the ground of stare decisis, is a point on which we need express no opinion; but there is no warrant for extending the rule beyond the facts of those cases. As we have said, those facts are, that the coparcenary became extinct by the death of the last survivor and his property thereupon devolved on his heir. The facts in the present case are different. The coparcenary became extinct not in that manner, but by the survivors having come to a partition of the joint family property. We are not prepared to hold that in such a case the widow's power comes to an end.

There is no reported decision on the actual point raised in the appeal. But the opinion of Mr. Sarkar Sastry supports the plaintiff's contention. According to that learned author:

"the power of adoption cannot be exercised after a partition of the family property takes place," and this view is based on grounds of supposed convenience. Says Sarkar Sastry:

"To reopen the partition for giving a share to the adopted son, would lead to great difficulties, for one of the co-sharers might alienate his share to a purchaser for valuable consideration without notice."

But he goes on to observe that the point is not free from difficulty and refers to some conflict, which he supposes to exist between the two Privy Council decisions, *Bhoobun Moyee's* case (5) and the first *Chinnakimedi* case. Sarkar's Hindu Law of Adoption 1891 edition pp. 253 and 254. In *Krishna v. Sami* (15), a Full Bench of five Judges deduces from the Hindu law a principle which is the exact opposite of that stated by Mr. Sarkar Sastry. The following passage contains the relevant observation:

"Again, let C have died before partition, leaving a widow and having given her power to adopt which she does not exercise till after a partition has been made by B, D and E. When she exercises her power we apprehend that the adopted

(7) [1867-69] 12 M. I. A. 397=2 Suth. 135=2 Sar. 361 (P.C.).

(8) A. I. R. 1918 P. C. 192=50 I. C. 457=46 I. A. 97=43 Bom. 778 (P.C.).

(9) A. I. R. 1928 Mad. 118=109 I. C. 5.

(10) [1918] 49 I. C. 48.

(11) A. I. R. 1925 Mad. 497=93 I. C. 705=48 Mad. 1.

(12) [1910] 33 Mad. 228=4 I. C. 386.

(13) [1890] 14 Bom. 463.

(14) [1896] 20 Bom. 250.

(15) [1886] 9 Mad. 64 (F.B.).

son would be entitled to call upon his uncles to make over to him a portion of the wealth equal to that which would have been taken by his father: *Sri Virada Pratapa Raghunatha v. Sri Brozo Kishore* (2)."

If these observations were not merely obiter, the case would have been a direct authority in favour of the respondents.

We shall now examine the matter on principle. What does the statement, that when the rights acquired by third parties are defeated, the widow's power comes to an end, imply? That the object of assigning a limit to the widow's power is to safeguard the rights of such third parties. If this be the true view to take, why should it be held that the adoption is bad when the adopting widow [as in *Ram Krishna v. Sama Rao* (1)], is the very person whose estate is thereby defeated? Again, why should the adoption be held invalid not only as against the person whom it divests, but even as against [as held in *Pudma Coomari Debi v. Court of Wards* (16) and *Thayammal v. Venkatarama Ayyar* (17)] distant reversioners? Mr. Somayya's answer is that the power having come to an end, cannot be revived. This is merely arguing in a circle. Why should it be held at all on his theory that the power came to an end? The object being the safeguarding of other peoples' right (as his argument assumes), it would be sufficient for achieving that end, to hold that the power is in abeyance ready to revive on the removal of the obstruction. If, on the other hand, the test of the limiting principle is what we have stated above, it stands to reason that when once the spiritual purposes are satisfied, the power to adopt finally and for ever comes to an end.

Again, the validity of an adoption must be judged intrinsically on its own merits, and not with reference to considerations extraneous to it. The facts of the present case which are somewhat unusual, serve forcibly to illustrate the incongruity of the position taken up by the plaintiffs. The suit relates to the estate not of the adopting widow's husband but of her father. The plaintiffs are not interested in the rights which are said to be defeated, nor are the husband's agnates interested in the estate which the plaintiffs represent. The adoption in this case hav-

ing been made with the consent of those agnates, no question of the safeguarding of their rights can arise. The test suggested by the plaintiffs is altogether unsatisfactory and cannot furnish the true criterion.

Mr. Somayya advances an alternative contention. He puts his case thus: Rameswaramayya died after the partition and the properties allotted to him vested on his death in his widow Subbamma. The argument is, that whether or not the widow's power became extinct on the partition, it came to an end, at any rate, on Subbamma succeeding to her husband. The plaint proceeds on an altogether different assumption. It is stated in para. 3 that the joint family consisted only of four brothers the name of Rameswaramayya being omitted. Then the plaint goes on to say, that Ramakrishnayya (defendant 1's husband) died first and then Sivaramiah and that the two remaining brothers (Venkatachalamiah and Ramasubbiah) entered into a partition. There is thus no mention of Rameswaramayya. Nor have the defendants alleged in their written statement that he also was a party to the partition. The parties thus when they went to trial, entirely ignored Rameswaramayya. But the alternative contention not only assumes that he was a party to the partition, but that, on his death, his property vested in his widow. Even the lower Court's judgment does not contain any reference to this argument. But the plaintiffs point to some statements made by the defence witnesses, which we are asked to treat as admissions. We do not think that a point of this importance, not raised in the pleadings and not referred to in the lower Court's judgment, should be allowed to be raised.

In the result, we hold that the adoption by defendant 1 is valid and confirming the decision of the lower Court, dismiss the appeal with costs. The memorandum of objections is allowed with costs.

P.R.S./B.V.

Appeal dismissed.

(16) [1882] 8 Cal. 302=8 I. A. 229=4 Sar. 285 (P.C.).

(17) [1887] 10 Mad. 205=14 I. A. 67=5 Sar. 10 (P.C.).

* * A. I. R. 1932 Madras 233

JACKSON, J.

Kambhan Chenchayya — Plaintiff—Appellant.

v.

Bandarupalli Bapayya and others—Defendants—Respondents.

Second Appeal No. 417 of 1928, Decided on 27th October 1931, from decree of Dist. Judge, Guntur, in Appeal Suit No. 49 of 1926.

* * Provincial Insolvency Act (1920), Ss. 27 and 53—Mortgage by insolvent constituting alleged act of insolvency—Court adjudicating ex parte mortgagor to be insolvent and holding mortgage as void—Mortgagee suing for declaration that mortgage is valid—Former order of Court having been passed erroneously held to be no bar of *res judicata*—Civil P. C. (1908), S. 11.

Where on effecting a mortgage, the mortgagor is adjudicated an insolvent and the same order also declares the mortgage to be void, but the order is passed ex parte of the mortgagor and where the same mortgage forms the alleged act of insolvency, the insolvency Court passes the latter part of the order without jurisdiction. The Court in such cases should not avoid alienation until moved by the Official Receiver under S. 53, or by an aggrieved party. No one else can do it.

In the same case, where the mortgagee sues for declaration that the mortgage is valid, the former order cannot operate as a bar of *res judicata*. That part of the order avoiding the mortgage having been passed by the Court without jurisdiction the same matter cannot be held to be substantially in issue. If a Court, from an erroneous view of its powers, proceeds to deal with something not substantially in issue, the absentee party cannot be held bound by that decision. An ex parte decree can only be *res judicata* in respect of a matter in which relief has been claimed in the plaint. But where the relief is claimed prematurely in the plaint, and the Court nevertheless passes a decree, a party is justified in holding that such a relief will never be substantially in issue, because the Court can be trusted to know its powers and to perform its duty, and if on the strength of that belief the party remains absent, an erroneous exercise of the Court's power cannot constitute *res judicata*: 21 Bom. 205 and 2 Pat. L. J. 101, Ref. [P 233 C 2; P 234 C 1]*Ch. Raghava Rao*—for Appellant.*M. Patanjali Sastri* for *B. Somayya*—for Respondents.**Judgment.**—The plaintiff sues for a declaration that a mortgage deed is valid. He is transferee of the mortgagee, defendant 10.

The mortgagors defendants 1 to 3, were declared insolvent on a creditor's petition. The alleged act of insolvency was the fraudulent execution of this very mortgage and it was prayed that the alienation be declared void: I. P. No. 53 of 1918, p. 2 of documents.

Defendant 10 got notice of this peti-

tion and remained ex parte (para. 6 of order, p. 5 of documents). The Judge in his "order" found that there was no opposition to the petition to adjudicate the debtors insolvent, declared the alienation void and vested the assets in the Official Receiver: para. 7. It will be noted that this "order" does not in terms adjudicate the debtor an insolvent. But on the same date an order of adjudication was also issued: p. 3 of documents. More than that a Court is not required to do under S. 27, Act 5 of 1920 and it is difficult to say if the "order" is more than obiter.

A similar order by the same Judge was under consideration in *Appireddi v. Appireddi* (1), where it is held, following *Hemraj Champa Lal v. Ram Kishen Ram* (2), that the Judge should not avoid such alienations until moved by the Official Receiver under S. 53, or by an aggrieved party. "No one else can do so."So much is undisputed. The present question is whether defendant 10, and through him the plaintiff, are bound by *res judicata* because defendant 10 allowed the proceeding to go ex parte, and suffered this decision that the alienation was void.The learned Judge in the lower appellate Court has ingeniously argued that the bankruptcy Court had inherent jurisdiction to avoid the alienation, and the fact that it was exercised erroneously will not help the plaintiff. But to build up a constructive *res judicata* it must be found in the first place that the matter was directly and substantially in issue. Can a matter be said to be thus in issue at a stage when the Court cannot go into it? The answer is that it cannot—to hold otherwise would be to treat "substantially" as meaningless. If the Court, from an erroneous view of its powers, proceeds to deal with something not substantially in issue, the absentee party cannot be held bound by that decision. There does not seem to be a case exactly in point, because this sort of error by the Court itself is happily rare. An ex parte decree can only be *res judicata* in respect of a matter in which relief has been claimed in the plaint. But the case has not previously arisen where the relief is claimed, but claimed prematurely, in the

(1) A. I. R. 1922 Mad. 246=66 I. C. 271=45 Mad. 189.

(2) [1917] 2 Pat. L. J. 101=38 I. C. 269.

plaint, and the Court has nevertheless passed a decree. I think that a party is justified in holding that such a relief would never be substantially in issue, because the Court could be trusted to know its powers and to perform its duty, and if, on the strength of that belief the party remained absent, an erroneous exercise of the Court's power cannot constitute *res judicata*.

It may also be argued that the adjudication on the insolvency petition is entirely contained in what is called the order of adjudication and the order of the same date is an informal superfluity which in no case can amount to a *res judicata*. *Sardormbal v. Sabhapathy* (3), cited by the lower appellate Court does not clarify the matter. There the insolvency Court in the ordinary exercise of its jurisdiction had adjudicated a debtor insolvent, and it was pointed out that its adjudication could not afterwards be treated as a nullity on the mere plea that an act of insolvency had not been proved. The appeal is allowed with costs up to date throughout. The original Court must proceed with plaintiff's suit. The court-fees in appellate Courts may be refunded.

P.R.S./B.V.

Appeal allowed.

(3) [1897] 21 Bom. 205.

A. I. R 1932 Madras 234

BEASLEY, C. J. AND CORNISH, J.

Hazarimull Chandukchand and another—Appellants.

v.

N. R. Vedachala Chettiar and another—Respondents.

Original Side Appeal No. 27 of 1930, Decided on 27th October 1931, against decision of Waller, J., D/- 28th January 1930.

Madras Hindu Religious Endowments Act (1925), S. 73—S. 73 does not apply where Civil P. C., S. 92 does not apply—S. 73 does not therefore apply to suits between temple trustees and alienees from trustee of trust property—Civil P. C. (1908), S. 92.

As between a trustee of a temple and other trustees of the temple or as between the worshippers of a temple and the trustees of a temple and the persons interested in the temple when questions of administration of the trust arise, those are matters which come within the scope of S. 73 of the Act. But entirely different considerations apply where the parties are on the one hand trustees of a temple and on the other hand entire strangers who claim to be alienees of property wrongly obtained by them through the maladministration of a trustee. The Madras Hindu Religious Endowments Act, particularly S. 73, does not embrace any relief which could not

formerly have been obtained under the procedure set out in Civil P. C., S. 92. Civil P. C., S. 92 and the corresponding section of the old Code do not apply to suits between trustees of a temple and alienees from a trustee of a temple of trust properties. Therefore the effect of S. 73 of the Endowments Act, is that a suit which could only be instituted by the Advocate General or some persons with his consent under Civil P. C., S. 92 must when it relates to a religious endowment governed by the Act, be instituted by the Endowments Board or by some person having an interest and with the consent of the Board; and as a suit to recover trust property from its alienees does not come within S. 92 of the Code, such a suit is equally outside the scope of S. 73 of the Act: *A.I.R.* 1931 *Mad.* 801; 40 *Mad.* 212; 33 *Cal.* 789 and *A.I.R.* 1928 *P. C.* 16, *Ref.* [P 235 C 1; P 236 C 1, 2]

T. G. Raghavachari—for Appellants.

K. Narasimha Ayyar—for Respondents.

Beasley, C. J.—This is an appeal from a judgment of Waller, J. He had before him a suit claiming reliefs against seven defendants. Defendant 1 was one of the trustees of a temple in the Chingleput District and the reliefs sought against him were his removal from trusteeship, an account and various other reliefs which are properly to be obtained under S. 73, Madras Hindu Religious Endowments Act. It was alleged that he had badly administered the trust and that as a result of the maladministration, some property belonging to the temple and set out in the plaint got into the hands of the other defendants. The only defendant appealing here is defendant 2 and he is admittedly the alienee of the most valuable of all the trust property and that property is wholly situate in Madras. It is quite true that the suit has all the appearances of a suit under the Madras Hindu Religious Endowments Act. The sanction of the Endowments Board has been obtained and the reliefs sought are, as already pointed out, reliefs which are properly obtainable under that Act. But something happened in the lower Court. Mr. Narasimha Ayyar who was appearing for the plaintiffs did not press his claim against defendant 1. It should be remarked that plaintiff 1 is also a trustee of the temple and, whether it was so stated at the time or not, it is quite clear that he could not have pursued his remedy here against defendant 1 by reason of the fact that the suit in this High Court was barred by the provisions of S. 73, Madras Hindu Religious Endowments Act. Accordingly the suit against defendant 1 was dismissed. That leaves only the alienees. Of these the alienees other than

defendant 2 have been content with the position of affairs as decided in the lower Court which was that, as regards the suit properties, the question whether their transfers can be set aside is to be inquired into. Defendant 2 appeals. His contention here is that the claim against him is one within the provisions of S. 73 (2), Hindu Religious Endowments Act, and that this Court therefore has no jurisdiction to try the suit. He puts forward this contention by reason of the wording of that subsection which is as follows :

"Sections 92 and 93 and R. 8, O. 1, Sch. 1, Civil P. C., 1908, shall have no application to any suit claiming any relief in respect of the administration or management of a religious endowment and no suit in respect of such administration or management shall be instituted except as provided by this Act."

These words, it is argued, mean that any suit between any parties in which the question of the administration of a religious endowment comes into question immediately attracts the provisions of S. 73, Madras Hindu Religious Endowments Act. It is argued that that section is wide enough to embrace any suit in which such a matter has to be considered. The appellant prays in aid *Vythilinga Pandara Sannadhi v. Temple Committee, Tinnevely Circle* (1), a decision of a Bench of this Court consisting of Curgenvin and Cornish, JJ. There, what the Court had to consider was a claim of a purely personal nature. It was a suit to establish the plaintiff's personal right as hereditary trustee of a certain village temple; and it was held that the provisions of S. 73 did not apply to any such claim. Then the Bench went on to state as follows :

"The suit raises no issue as to the manner in which the trust property has been administered or should in future be administered."

That, it is argued, is a decision to the effect that in all cases where there arises a question involving the consideration of administration of trust property, the provisions of S. 73, Madras Hindu Religious Endowments Act, are at once attracted. In my view, that is going much beyond what was expressed in that decision. What we have got to consider here is whether in a case where trustees of a temple are suing entire strangers to the temple, the provisions of S. 73, Hindu Religious Endowments Act, apply at all. As between a trustee of a temple and other trustees of the temple or as between the

worshippers of a temple and the trustees of a temple and the persons interested in the temple, clearly when questions of administration of the trust arise, those are matters which come within the scope of S. 73, Hindu Religious Endowments Act. But entirely different considerations apply where the parties are on the one hand trustees of a temple and on the other hand entire strangers who are claiming to be alienees of property wrongly obtained by them through the maladministration of a trustee. It seems to me that there is nothing in S. 92, Civil P. C., which has not been taken bodily out of that section and placed either in S. 73 or other sections of the Madras Hindu Religious Endowments Act; and it seems to me clear that the Madras Hindu Religious Endowments Act, particularly S. 73, does not embrace any relief which could not formerly have been obtained under the procedure set out in S. 92, Civil P. C. It is admitted that such a claim as this would not have been one which was within the provisions or subject to the procedure of S. 92, Civil P. C. Except for the decision of the Bench already referred to and some observations which appear in a Full Bench case, viz., *Venkatarama Iyengar v. Kasturi Ranga Ayyangar* (2), at p. 232, no authorities have been quoted in support of the extreme contention of the appellant here. In that case the Full Bench was dealing with a case very similar to this and it held that the claim there was not one which was within the provisions of S. 92, Civil P. C. It is true that at the end of his judgment Seshagiri Iyer, J., says at p. 232 as follows :

"If I may venture a suggestion the time is come for the intervention of the legislature to insert a clear and unambiguous provision in the Code of Civil Procedure that all reliefs relating to public, religious and charitable trusts, except those which partake of the character of personal or communal rights, should be litigated only under the provisions of S. 92 (1). An amendment of Act 20 of 1868 may be necessary to give full effect to this suggestion."

Then Phillips, J., makes similar observations. It is suggested that it was in consequence of those expressions of opinion that S. 73, Madras Hindu Religious Endowments Act, came to be drafted in the form it is. It is curious that it should be suggested that observations made in 1917 were the reason and cause of a statute which was only passed ten years later. Personally I can see no connexion between

(1) A.I.R. 1931 Mad. 801=133 I.C. 14=54 Mad. 1011.

(2) [1917] 40 Mad. 212=38 I.C. 73.

those observations and S. 73 of the Act. There is ample authority in support of the position that S. 92, Civil P. C., and the corresponding section of the old Code do not apply to suits between trustees of a temple and alienees from a trustee of a temple of trust property. In *Budree Das v. Chooni Lal* (3), Woodroffe, J., says at p. 804 :

"It is on this principle, viz., that the suit contemplated by the section is directed against trustees, that it has been held that as against strangers it does not apply."

He then sets out a number of decisions two of which are decisions of this High Court on that point establishing that principle, and then continues :

"It has doubtless been held in one case that, where there is a claim for administration of trust, which falls within the section, a claim to eject an alienee may be joined with it : *Sajedur Raja Chowdhry v. Gour Mohan Das* (4). But the latter claim does not, in my opinion, come within the scope of the section and is open to the charge of misjoinder, and the decision has been dissented from in a later case *Budhsingh Dudhuri v. Niradbaran Ray* (5), with which I agree."

This decision of the Calcutta High Court was one under the corresponding section of the old Code. There is further authority to be found with regard to S. 92 of the present Code in a decision of the Privy Council. *Abdur Rahim v. Mohamed Barkat Ali* (6), Lord Sinha in delivering the judgment of their Lordships states at p. 526 :

"It is urged broadly on behalf of the respondents that all suits founded upon any breach of trust for public purposes of a charitable or religious nature, irrespective of the relief sought, must be brought in accordance with the provisions of S. 92, Civil P. C. The short answer to that argument is that the legislature has not so enacted. If it has so intended, it would have said so in express words, whereas it said, on the contrary, that only suits claiming any of the reliefs specified in sub-S. (1) shall be instituted in conformity with the provisions of S. 92 (1)."

Nevertheless the contention of the learned counsel for the appellant here is that, although suits between a trustee of a temple and trespassers or alienees from the trustee of temple are not within S. 92, Civil P. C., directly it is necessary to prove the plaintiff's case by evidence that the alienation was the result of mismanagement by that trustee, the provisions of S. 73, Madras Hindu Religious Endowments Act, are at once attracted. I can see no warrant for

any such contention. To so contend is to very widely amend the words in sub-S. (2) of that section. If it had been intended to deprive the litigant of his right of the choice of the forum, it would have been done so by express enactment and not left to be a matter of mere implication. I cannot myself see that that deprivation is even implied in sub-S. 2 to that section. Under these circumstances it is quite clear to me that the learned trial Judge was quite right in deciding that the Court had jurisdiction to proceed with the case as against the appellant. It is very difficult to see with what object this appeal has been presented. The other alienee defendants have been quite content with the position imposed upon them in the lower Court and it is conceded here by the learned counsel for the appellant that there can be no bar of limitation, even in the event of the appellant's success here, to a suit claiming exactly the same reliefs being filed in the District Court at Chingleput. Under these circumstances, it is very difficult to see what the appellant had to gain by presenting this appeal unless it be time. This appeal must be dismissed with costs.

Cornish, J.—I agree. I find it difficult to understand how the judgment reported in *Vythilinga Pandara Sannadhi v. Temple Committee, Tinnevelly* (1), to which I was a party, is supposed to give support to the appellant's contention that if a suit raises a question touching the validity of an alienation of trust property by a trustee, it is a suit in respect of the administration or management of the trust within S. 73, Madras Hindu Religious Endowments Act. The sole question in that case was whether a suit to establish a claim to the hereditary trusteeship of a temple was barred by S. 73. We held that it was not for the reason that it was a suit to establish a private right and not a suit in respect of the administration or management of a temple. In my opinion, the effect of S. 73 of the Act is simply this that a suit which could only be instituted by the Advocate-General or some persons with his consent under S. 92, Civil P. C., must, when it relates to a religious endowment governed by the Act, be instituted by the Endowments Board or by some person having an interest and with the consent of the Board. It is pointed out in *Vythilinga Pandara Sannadhi v. Temple Committee, Tinnevelly* (1), that though

(3) [1906] 33 Cal. 789=10 C.W.N. 531.

(4) [1897] 24 Cal. 418.

(5) [1905] 2 C.L.J. 431.

(6) A.I.R. 1928 P.C. 16=108 I.C. 361=55 I.A. 96=55 Cal. 519 (P.C.).

some of the reliefs specified in S. 92, Civil P. C., are reproduced verbatim in S. 73 of the Act the others are provided for elsewhere in the Act. And as it has been held by the Full Bench in *Venkata Rama Iyengar v. Kasturi Ranga Ayyangar* (2), that a suit to recover trust property from its alienees does not come within S. 92 of the Code, I think it follows that such a suit is equally outside the scope of S. 73 of the Act, and that this appeal fails.

P.R.S./B.V.

Appeal dismissed.

A. I. R. 1932 Madras 237

MADHAVAN NAIR AND JACKSON, JJ.
Doraiswami Chettiar—Appellant.

v.

Abdul Suban Sahib and others—Respondents.

Appeal No. 453 of 1927, Decided on 28th August 1931, against order of Dist. Judge, South Arcot, D/- 27th September 1927.

Provincial Insolvency Act (1920), S. 10—Debtor has right to get himself adjudicated insolvent on satisfying provisions of S. 10—Possession of assets is not necessary condition for debtor to prove.

The possession of assets is not a condition necessary for a debtor to prove before he is adjudicated insolvent. The conditions which should be complied with by a debtor presenting an application for adjudication are mentioned in S. 10. The debtor has a statutory right of getting himself adjudicated an insolvent if he satisfies the provisions of S. 10. The Court can refuse adjudication only if it is not satisfied as to his right to present the petition: *A. I. R. 1916 P.C. 64, Foll.* [P 237 C 2]

M. S. Venkatarama Ayyar—for Appellant.

V. Rajagopala Ayyar—for Respondents.

Madhavan Nair, J.—This is an appeal against an order of the learned District Judge of South Arcot refusing to adjudicate the appellant an insolvent. The appellant presented an application on 9th February 1924 for getting himself adjudicated an insolvent. That was dismissed by the Official Receiver for default. A second application filed by him was also dismissed as he and his pleader were absent. The present application was the third one. The petition disclosed no assets and the learned District Judge held that this is a case in which adjudication ought not to be made as the petition discloses no assets nor any reasonable prospect of future assets.

"To pass an adjudication order on a petition like this would be useless and oppressive (See 1 Q.B. 50). The Insolvency Act would appear to proceed on the assumption that there would be at least some assets."

On these grounds he dismissed the application.

It appears to us that the possession of assets does not seem to be a condition necessary for a debtor to prove before he is adjudicated insolvent. The conditions which should be complied with by a debtor presenting an application for adjudication are mentioned in S. 10 of the Act. According to this section he must prove that he is unable to pay his debts and that his debts amount to Rs. 500 or that he is under arrest or imprisonment in execution of the decree of any Court for the payment of money or that an order of attachment in execution of such a decree has been made and is subsisting "against such property." No reference is made to the possession of assets as one of the conditions for presenting a petition. S. 24 of the Act prescribes the procedure to be followed by the Judge at the time of the hearing of the petition. It is stated there that the Court shall require proof that the creditor or the debtor, as the case may be, is entitled to present the petition, i.e., we must take it that in this case the petitioner must prove that the conditions mentioned in S. 10 existed. S. 25 relates to the dismissal of the petition and Cl. (2) of that section says that in the case of a petition presented by a debtor, the Court shall dismiss the petition if it is not satisfied of his right to present the petition. S. 27 says that if the Court does not dismiss the petition, it shall make an order of adjudication. These sections show that the debtor has a statutory right of getting himself adjudicated an insolvent if he satisfies the provisions of S. 10 and that the Court can refuse adjudication only if it is not satisfied of his right to present the petition. In support of his opinion the learned Judge refers to 1 Q. B. 50. We are not able to trace this case. If he meant to rely on *Ex parte Painter, in re Painter* (1), in support of his argument that there should be some assets disclosed in the petition before proceeding with it, then that decision does not support him. The view that we have taken receives support from the Privy Council decision

(1) [1895] 1 Q. B. 85=64 L. J. Q. B. 22=71 L.T. 581=1 Manson 499.

in *Chatrapat Singh Dugar v. Kharag Singh Lachmi Ram* (2), though in that case the petition was dismissed on the ground that it was an abuse of the process of the Court. The observations of their Lordships in that case show that the debtor has a statutory right to get himself adjudicated an insolvent if he complies with the provisions of S. 10. We therefore set aside the order of the lower Court and direct the learned Judge to take the petition on his file and dispose of it according to law in the light of our observations.

In the circumstances of the present case we make no order as to costs.

P.R.S./R.M. *Order set aside.*

(2) A. I. R. 1916 P. C. 64=39 I.C. 788=44 I.A. 11=44 Cal. 535 (P.C.).

A. I. R. 1932 Madras 238

CURGENVEN, J.

Govindan Asari and another—Appellants.

v.

Nagayan Chettiar and others—Respondents.

Second Appeal No. 1448 of 1928, Decided on 17th September 1931, against decree of Sub-Judge, Dindigul, in A. S. No. 75 of 1926.

(a) Mortgage—Property sold to mortgagor by minor's guardian—Subsequent submortgage—Submortgagee becoming auction-purchaser of same property in his mortgage decree against mortgagor and submortgagor—Submortgagee not party to suit by minor against mortgagor that sale of mortgaged property by guardian of minor did not bind minor—Minor's decree does not bind submortgagee—But submortgagee's title does not give him right of possession of suit property—He has no right to possess that property as auction-purchaser.

A minor's guardian had sold some property to the mortgagor. The property was then submortgaged and the submortgagee had in a suit against the mortgagor and the submortgagor become the auction-purchaser of the mortgaged property in execution of his decree. Subsequently the minor obtained a decree against the mortgagor and the submortgagor, without impleading the submortgagee to the effect that the sale of the suit property by his guardian did not bind him.

Held: that in the above circumstances the decree in favour of the minor did not affect the title of the submortgagee as it did not bind him. But that submortgagee's title did not give the possessor of it a right to possession of the property. As an auction-purchaser, the submortgagee was bound by the decree, because in that respect he had derived his title from the mortgagor and the submortgagor. Therefore, though the submortgagee's title was not affected by the decree, still the minor was entitled to a declara-

tion for the possession of the property : 4 Cal. 692 ; A. I. R. 1921 Mad. 708 ; 12 W. R. 362 ; 40 Bom. 679 ; 22 Cal. 364 and A. I. R. 1931 Pat. 64, *Rel. on.* ; A. I. R. 1923 Mad. 440, *Expl.* ; 19 All. 541 ; 22 Bom. 945 ; 5 Bom. 8 ; 30 Mad. 500 and 8 Bom. 481, *Ref.* [P 240 C 2]

(b) Civil P. C. (1908), S. 11—Suit—Person not party to suit acquiring interest before suit—He is not bound by decision in suit.

It is unquestionable, as a general proposition, that where a person possesses an interest, acquired before the suit in an estate, which interest is not represented by any of the parties to the suit, the decision will not be *res judicata* against him. Thus a vendee from a party prior to suit will not be bound : A. I. R. 1921 Mad. 708 ; 4 Cal. 692 ; 12 W. R. 362 and 22 Cal. 364, *Rel. on.* [P 239 C 1]

K. Rajah Ayyar—for Appellants.

A. V. Narayanaswami Ayyar and *T. P. Gopalakrishna Ayyar*—for Respondents.

Judgment.—The question which arises in this second appeal is as to the effect upon a submortgagee of a decree to which he was not a party declaring that a sale to the mortgagor by the guardian of a minor is not binding upon the minor. The sale was effected under Ex. 4 on 20th March 1902 to one Suppayya Maniyagan. In 1908 the vendee usufructuarily mortgaged the property to one Ramasami Asari and in 1911 the latter submortgaged it to defendant 1. Upon the submortgage O. S. No. 634 of 1914 was filed impleading the mortgagor and the mortgagee and a decree was obtained on 12th December 1914. The decree-holder brought the property to sale in 1922 and bought it himself. Meanwhile the minor, on attaining majority, had sued in O. S. No. 657 of 1915 to set aside the alienation. He made parties to the suit the mortgagor and the mortgagee but not the submortgagee. He obtained a decree in 1917 which directed that the sale should hold good if the defendants paid to the decree-holder a sum of Rs. 260, which was the part of the sale price found not binding upon him. If they failed to do this he might pay them the balance of Rs. 490, the whole price being Rs. 750, and take the property. The latter course was followed and the decree-holder given delivery. In 1919 he sold the property to the plaintiff, who has now sued defendant 1 and his representatives for a declaration of his right to possession and for an injunction restraining them from entering upon the property. The question therefore is whether by force of the decree in O. S. No. 857 such a declara-

tion and injunction may be given notwithstanding that the submortgagee was not a party to the suit.

It is unquestionable, as a general proposition, that where a person possesses an interest, acquired before the suit, in an estate, which interest is not represented by any of the parties to the suit, the decision will not be *res judicata* against him. Thus a vendee from a party will not be bound. The same principle has been applied to the case of a lessee in *Mussan Haji v. Thavara Koran* (1). The position of a mortgagee is more closely comparable than either of these to that of a submortgagee. It was held in *Bonmalee Nag v. Kaylash Chandra* (2) following an earlier case in *Dooma v. Joona* (3) that a simple mortgagee was not bound by the decision in a suit regarding a right of way over the property. This case again was followed in *Soshi Bushan v. Gogan Chander* (4). The learned Judges in that case refer to the general rule that a judgment *inter partes* binds only the parties and persons deriving title from them subsequent to the date of the judgment. They recognize that exceptions exist to the rule based either upon grounds of justice and expediency or upon express legislation, the cases of a Hindu widow or a shebait being referred to as instances where the party must be held to represent the estate completely. But the same does not apply to the proprietor of an estate after he has mortgaged it :

"The mortgagee can always be ascertained; very often his interest in the estate may be much greater than that left in the mortgagor; and sometimes, as in the present case, where, after decree, it was no part of the mortgagor's interest to protect the incumbrance, the interests of the two are not identical."

Other cases dealing with the same point are *Ramachandra Dhandu v. Malkapa* (5) and *Ghanshyam Das v. Raghu Singh* (6). Is there any reason to suppose that a submortgagee's interest should form an exception to this rule? The learned Subordinate Judge who heard the first appeal has relied on the authority of a case in *Rarichan v. Elambilakad* (7) for holding that a submortgagee will be bound. The

circumstances of that case which was decided by Ramesam, J., were very exceptional and the question in its general form did not arise. So far from holding, as the learned Subordinate Judge thinks, that a submortgage is bound by the decree between his submortgagee and the stranger, the learned Judge has expressly stated that the findings in the suit do not bind the submortgagee, and therefore the decision proceeded upon other considerations. There is I think very little difference between the position of a submortgagee and that of a transferee of the original mortgage: see Halsbury, Vol. 21, part 6, paras. 336 to 338, where the legal incidents of such an interest are set out. It seems clear to me that if a mortgagee is not bound by impleading his mortgagor, similarly the mortgagee of a mortgagee, i. e., a submortgagee, is not bound by impleading his submortgagor. As has been remarked by the Bench in *Sashi Bushan v. Gogan Chandar* (4) it may very well be that the interest of the submortgagee in the estate may be much greater than that left either in the mortgagor or in the mortgagee; nor need it always happen that the interests of the two latter are identical with those of the former.

A submortgagee's title does not however give the possessor of it a right to possession of the property, which forms the real contest in this case. It has been noted that the submortgagee obtained a decree under which in 1922 he purchased the property. Has he by so doing acquired a right to possession by virtue of this purchase, in spite of the decree against his submortgagor in O. S. No. 857? It has been suggested that he has such a right because to hold him divested of it by the decree in O. S. No. 857 would involve the position that while that decree is not *res judicata* against him, yet it has had the effect of depriving him of a right which he would otherwise enjoy. Can he ignore that decree both as regards its effect on the position of his mortgagor as well as on his own position? I think that the answer must be that his submortgagee's right alone is unaffected by the circumstance that he was not made a party. He is not entitled to possession as submortgagee, but as auction-purchaser under his own decree; and in so far as he can claim possession as auction-purchaser, that claim is derived from the owner of the equity of redemption, the judgment-

(1) A. I. R. 1921 Mad. 708=65 I. C. 979.

(2) [1879] 4 Cal. 692.

(3) [1869] 12 W. R. 362=4 B. L. R. A. C. 27n.

(4) [1895] 22 Cal. 364.

(5) [1916] 40 Bom. 679=36 I. C. 443.

(6) A. I. R. 1931 Pat. 64=130 I. C. 257=10 Pat. 234.

(7) A. I. R. 1923 Mad. 440=72 I. C. 638.

debtor in his mortgage suit. As has been held in *Magan Lal v. Shakra Girdar* (8), and is, I think, indisputable, by a sale of the mortgaged property under a mortgage decree, the interests both of a mortgagor and mortgagee pass to the purchaser. I do not think that the application of the rule of *res judicata* will go so far as to preserve in the interests of the submortgagee the estate of his judgment-debtor, who was a party to the other suit and whom the decree in that suit divests of his interest in the property. Cases such as *Shaik Abdulla Saiba v. Haji Abdulla* (9) and *Trimbock Balkrishna v. Narayan Damoda* (10), which have held that what is sold in a mortgage suit is the interest of the mortgagor and the mortgagee as they stood at the time of the mortgage, refer, I think, to alienations made or encumbrances subsequently created, and not to the displacement of the mortgagor's interest by a paramount title, which must be held to relate back to a point of time before the mortgage itself.

My attention has been drawn to one case, *Ramchandra Dhandu v. Malkapa* (5), in which the circumstances were closely parallel. That was a suit to set aside a guardian's sale in which the mortgagee was not impleaded. After the suit, the mortgagee brought to sale and purchased the property. He attempted to get possession of it but was resisted by the ex-minor. After holding that the mortgagor did not represent the mortgagee's estate, the learned Judges refer to the circumstance of the subsequent purchase by the mortgagee, but I do not understand them to hold that, as purchaser, the mortgagee had bettered his position. The case, I think, was regarded from the point of view of the mortgagor's rights and not those of the auction-purchaser, because the learned Judges say that they do not understand how the plaintiff is in any worse position merely because in 1904 he altered his original position of mortgagee to that of auction-purchaser, and they add:

"For, notwithstanding that alteration, the question would still be, not what was the plaintiff's position in 1904, but whether in 1898 the mortgagor possessed sufficient estate to represent his interest and bind his mortgagee."

So far as it goes, this case, I think, indicates that as auction-purchaser the

submortgagee is not in a better position. I have already referred for another purpose to *Bonomalli Nag v. Kaylashchandra* (2), which was another case in which the mortgagee became the purchaser at the auction sale. But here again it does not seem to have been argued that this made any difference, although the special question which arose in that case would seem to have made important the question of the right to possession of the property.

In *Entholi Kishakkikandy Kanaran v. Vallatti Koylil Unnoli* (11) a mortgage suit was brought against a mortgagor who had sold his interest to a third party who was not impleaded. In the Court sale the property was bought by a person not the decree-holder, who sued to eject the mortgagor's assignee. It was held, following *Hargulal Singh v. Govind Rai* (12), that all that the purchaser bought was the mortgagee's interest, and that he was not entitled to possession. It is true that the assignment was before the suit and that the principle of *lis pendens* would have applied to a conveyance of the mortgage during the suit. I doubt however whether that principle would apply to circumstances such as the present. Although the decree in O. S. No. 857 was later in date than the defendant's mortgage decree, it operated, I take it, as between the parties to the suit to avoid the sale of 1902 with effect from the date of that sale. Accordingly, no change in the title of defendant's submortgagor took place during his mortgage suit. The judgment-debtor had lost his title long before, and that being so, I do not think that the auction-purchaser obtained anything more than the rights of the submortgagee. I can find no reason to differ from the view taken by the learned Subordinate Judge that the auction-purchaser had to take the risk of any infirmity in the judgment-debtor's title and that, in the circumstances, nothing passed from that source by the sale. But I differ from the learned Judge and agree with the learned District Munsif in holding that defendant's title as submortgagee is not affected by O. S. No. 857, so that it would not be correct to give a decree, as the lower appellate Court has done, declaring the plaintiff's title unless it be a qualified declaration.

(8) [1898] 22 Bom. 945.

(9) [1880] 5 Bom. 8.

(10) [1884] 8 Bom. 481.

(11) [1907] 30 Mad. 500=17 M. L. J. 431.

(12) [1897] 19 All. 541=(1897) A. W. N. 154.

In point of fact, although the suit was treated as one for a declaration of title, the plaintiff asks only for a declaration of the right to possession and for an injunction, and I can see no objection to the grant of relief in this form. In part therefore I allow the appeal and modify the decree by declaring that the plaintiffs are "entitled to the possession of the properties" in place of "entitled to the properties." In other respects I confirm the decree and dismiss the appeal. As the appellant has substantially failed, he will pay the costs of second appeal.

P.R.S./B.V.

Decree modified.

A. I. R. 1932 Madras 241

VENKATASUBBA RAO, J.

P. Sankuni Menon—Appellant.

v.

Empire of India Life Assurance Co., Ltd., Bombay—Respondent.

Second Appeal No. 271 of 1928, Decided on 18th March 1931.

(a) Insurance—Premiums not paid on due date—Policy is voidable at election of insurers—Assured is not entitled to return of premium paid nor to paid-up policy or surrender value—Contract—Construction.

Where it is stipulated that the premiums are to be paid by a certain date they must be so paid or the policy is voidable at the election of the insurers. [P 243 C 1]

A policy by which A's life was insured by B Company was inter alia subject to following conditions and privileges:

Condition No. 3—Thirty days of grace are allowed for payment of yearly and half yearly premiums, and 15 days of grace for quarterly and monthly premiums. If payments not made before expiration of the days of grace, the policy becomes void, and all premiums paid in respect of it will be forfeited. If any life assured should die within the days of grace and before the payment of the premium the policy is valid subject to payment of the premium due.

Condition No. 5—A policy which has lapsed by nonpayment of the premium may be revived within 12 calendar months from the date on which the unpaid premium became due, if the life assured is still alive, without evidence of health, on payment of the overdue premium or premiums with interest thereon at the rate of annas eight per cent per month or part of a month (with a minimum of 4 annas) and fine of one rupee per month or part thereof, on each Rs. 1,000 sum assured, or portion hereof.

Condition No. 6—After payment of premiums for two years, policies may be surrendered to the company for a cash payment (based on the number of annual premiums paid) on application being made while the policy is in force or within 12 months from the date on which the last unpaid premium became due, if the life assured is still alive, and on payment of all premiums up to the date of application.

Condition No. 7—After premiums for not less

than two years have been paid and on application being made while the policies are in force or within 12 months from the date on which the last unpaid premium became due, if the life assured is still alive and on payment of all premiums up to the receipt of such application and of interest thereon, the policies will be made paid up for amounts proportionate to the number of annual premiums paid.

A paid up premiums regularly for 11 years. Subsequently A made a default in payment, whereupon he was informed by B that the policy had lapsed by reason of the nonpayment of premium on the due date and it could be revived according to terms in the contract, but could not under any circumstances be revived after 12 months from the date of default. In spite of several reminders within the 12 months from the date of default A took no action and after a lapse of about four years instituted a suit against B praying for a declaration that the policy was revivable and for an injunction compelling B to treat the policy in all respects alive and in force and also claiming a fully paid up policy with proper bonus allotment.

Held: that A was not entitled to the declaration he claimed that the policy was revivable, not having made payments as required by conditions 3 and 5: *McKenna v. The City Life Insurance Co.*, (1919) 2 K. B. 491 and *Handler v. Mutual Reserve Fund Life Association*, (1904) 90 L.T. 192, *Rel. on.* [P 242 C 2]

That A was not entitled to the return of premiums paid by him as the risk had begun to run: 43 *Mad.* 333, *Rel. on.* [P 243 C 2]

That A was not entitled to a fully paid up policy or to a surrender value not having fulfilled the provisions of condition No. 7.

That even assuming that conditions Nos. 6 and 7 were stipulations for forfeiture they were not stipulations in the nature of penalties: *A. I. R.* 1922 *Mad.* 67, *Rel. on.* [P 244 C 1, 2]

(b) Contract—Construction—Mercantile contract—Although time is not of essence each party is entitled to have contract performed within reasonable time.

Although there is no place in mercantile contracts for the presumption that time is not of the essence of the contract yet each party has a right to have the contract performed within reasonable time according to the circumstances of each case. [P 244 C 1]

(c) Contract Act (1872), S. 74—Contract of insurance.

What may be construed as penalty in the case of an ordinary loan is not necessarily a penalty in case of a contract of insurance: *A. I. R.* 1922 *Mad.* 67, *Ref.* [P 244 C 2]

K. P. Ramakrishna Aiyar—for Appellant.

A. Suryanarayana—for Respondent.

Judgment.—By a policy of insurance, dated 14th April 1910, the defendants insured the life of the plaintiff for the sum of Rs. 3,000. The policy was what is generally known as an Endowment Policy. In return for the payment of Rs. 71-13-3 as a premium paid each half-year on 30th March and 30th September for 21 years, the defendants agreed to

pay the plaintiff's heirs the sum of Rupees 3,000 if death should take place before the expiration of the period, and the like sum of Rs. 3,000 to the plaintiff himself if he should survive it. The policy was inter alia subject to the following "privileges and conditions":

"Condition No. 3.—Thirty days of grace are allowed for payment of yearly and half-yearly premiums, and 15 days of grace for quarterly and monthly premiums. If payment is not made before expiration of the days of grace, the policy becomes void, and all premiums paid in respect of it will be forfeited. If any life assured should die within the days of grace and before the payment of the premium, the policy is valid subject to payment of the premium due.

"Condition No. 5.—A policy which has lapsed by nonpayment of the premium may be revived within 12 calendar months from the date on which the unpaid premium became due, if the life assured is still alive, without evidence of health, on payment of the overdue premium or premiums with interest thereon at the rate of eight annas per cent per month or part of a month (with a minimum of 4 annas) and fine of Re. 1 per month or part thereof, on each Rupees 1,000 sum assured, or portion hereof.

"Condition No. 6.—After payment of premiums for two years policies may be surrendered to the company for a cash payment (based on the number of annual premiums paid) on application being made while the policy is in force or within 12 months from the date on which the last unpaid premium became due, if the life assured is still alive, and on payment of all premiums up to the date of application.

"Condition No. 7.—In the case of whole life assurances with a limited number of premiums and of endowment of assurances, after premiums for not less than two years have been paid and on application being made while the policies are in force or within 12 months from the date on which the last unpaid premium became due, if the life assured is still alive, and on payment of all premiums up to the receipt of such application and of interest thereon, the policies will be made paid up for amounts proportionate to the number of annual premiums paid."

The plaintiff paid all the premiums payable up to 30th September 1921 and on that date, under the conditions, the policy had not only acquired a surrender value but the plaintiff had in the alternative become entitled to a fully paid-up policy for a proportion of the original sum assured. The plaintiff made default in payment of the premium due on 30th March 1922, and thereupon the defendants wrote to him stating that the policy had lapsed by non-payment of the premium due on 30th March and that it could not under any circumstances be revived after the expiry of 12 months from that date. They then drew his attention to the term of the contract bearing on the point and

said that it was still open to him to revive the policy by acting in accordance with that term. There was no reply. The company sent reminders on 31st August 1922, and on 28th February 1923, with no better result. I may also mention that on 1st November 1922, the defendants forwarded to the plaintiff bonus certificate for Rs. 75 being the bonus allotted to his policy at the company's valuation on 28th February of that year. It will be seen that all the four letters to which I have referred were written before the expiry of 12 months from the date of default in payment of premium. The plaintiff, who till then evinced no interest, wrote on 25th October 1924, (about 31 months after default) requesting the company to inform him what the most favourable terms were for reviving the policy, so that he might make an effort to pay up the amount due. In reply, the company stated that the policy, which had lapsed so far back as 1922, could not be revived. The subsequent correspondence between the parties may be ignored and the plaintiff brought this action on 16th January 1925. The reliefs claimed in the plaint are:

- "(1) To declare that the policy is revivable;
- (2) to grant an injunction compelling the defendants to treat the policy in all respects as alive and in force or give such other relief as the Court deems fit."

The plaintiff failed in his claim in the first Court and he thereupon preferred an appeal to the District Court. The appellate Judge made an order on 23rd December 1926, allowing the plaint to be amended by inserting certain words in prayer (b) after the amendment. That prayer would read thus:

"To grant an injunction compelling the defendants to treat the policy in all respects as alive and in force or give such other relief as a direction for the issue by the defendants to the plaintiff of a paid-up policy with all the bonus allotment as the Court deems fit."

On these facts, the first question arises, can the plaintiff insist that the policy shall be reinstated? The answer must be decisively in the negative. Condition No. 3 provides that if the premium due is not paid within the days of grace "the policy becomes void and all premiums paid in respect of it will be forfeited." Under Condition No. 5, a policy which has lapsed may be revived within 12 calendar months on payment of the overdue premiums with interest and a specified fine. This condition was clearly not satis-

fied; the request to revive the policy was made not within 12 months but after about 31 months:

"Where it is stipulated the premiums shall be paid by a certain date, they must be so paid or the policy is voidable at the election of the insurers: the Laws of Insurance, by Porter, Edn. 7, p. 93."

In *McKenna v. The City Life Insurance Co.* (1) the premium payable on 31st July 1915, and all subsequent premiums were unpaid. On 7th August 1916 the plaintiff who was assignee of the policy, offered to pay to the insurers the premiums then in arrear, contending that the 12 months mentioned in the conditions ran from the last of the days of grace, but the insurers refused to accept the premiums. It was held that the last premium became due on the date specified in the policy as that on or before which it was payable, namely, 31st July 1915; that the offer on 7th August 1916, to pay the premiums in arrear was consequently too late and that the policy had lapsed. By the conditions of the policy in that case, it was provided as follows:

"Condition No. 2.—Thirty days of grace, without liability to fine, are allowed for the payment of each renewal premium."

"Condition No. 17.—Any policy which has acquired a surrender value will not immediately lapse if a renewal premium be not paid within the days of grace, but will be kept in force for 12 calendar months from the date upon which the last premium became due the amount of premiums in arrear, together with interest thereon at the rate of 5 per cent per annum, forming a first charge upon the policy. The policy may be reinstated at any time during the said 12 months on payment of the arrear premiums and interest."

The question in that case was, whether the 12 months were to be calculated from the 1st day of July mentioned in the policy as the due date or from the end of the 30 days of grace. Scrutton, L. J., who tried the action, thus observes:

"In this case I come to the conclusion that a premium becomes due on the day specified in the body of the policy as the day on or before which it is to be paid as a condition of the company's liability to pay the sum insured. I gather that from the wording of the policy; and I notice with some satisfaction that that is the view taken by one of the greatest Judges who has ever sat in commercial causes in this country, Mathew, L. J."

This case shows with what strictness the term relating to the payment of premium is enforced. It is unnecessary to refer to further authorities, though I may mention another case, where the point

was assumed, though not decided. In *Handler v. Mutual Reserve Fund Life Association* (2), a policy of life insurance was expressed to be conditional upon the payment of the premiums each year within 30 days of their becoming due and the holder of the policy failed to pay a certain premium within those 30 days. Collins, M. R. after stating that the plaintiff had failed to fulfil one of the conditions of the policy, that the premium should be paid within certain limited times, goes on to observe "as the policy had ex hypothesi come to an end." Mathew, L. J. in the same case says thus:

"Now the original policy was gone—that is not disputed. According to these terms, it only subsisted so long as the payments were regularly made."

It is thus clear that the plaintiff is not entitled to the declaration he seeks that the policy is revivable.

As a part of the same question, his counsel argued that the plaintiff was entitled to the return of his premiums. In this claim also, he is bound to fail.

In the *Tanjore Life Assurance Co. v. Kuppanna Rao* (3) it was pointed out that when a policy lapses by nonpayment of the premium the assured is not ordinarily entitled to claim a return of the amounts paid, and the following passage from Bunyan on Life Assurance, Edn. 5, is cited:

"When the policy is void ab initio, or in any case where the premium has been paid but the risk has not been run, whether this has been owing to the fault, pleasure, or will of the assured, or to any other cause, the premium shall be returned by the insurers, but if the risk has once commenced there shall be no appointment or return of the premia afterwards."

That in this case the risk began to run, there can be no question. This relief also must be refused to the plaintiff.

Then comes the question: Is the plaintiff entitled to a paid-up policy, that is, the relief claimed for the first time in the plaint as amended? The condition in regard to the granting of paid-up policies is more fully set forth in the company's prospectus than in the policy issued to the plaintiff. In their legal effect the clauses are identical, but I shall reproduce the term as set forth in the prospectus:

"Assurances under this system are non-forfeitable inasmuch as should the policy-holder wish to discontinue the payment of future premiums after premiums for not less than two years have been paid he will be entitled to a fully paid-up policy for such proportion of the

(1) [1919] 2 K. B. 491=88 L. J. K. B. 1223=122 L.T. 30=1919 W. C. & J. Rep. 308.

(2) [1904] 90 L. T. 192.

(3) [1920] 43 Mad. 333=55 I. C. 660.

original sum assured as the number of the annual premiums actually paid bears to the whole number payable, on application being made while the original policy is in force or within 12 months from the date on which the last unpaid premium became due (if the life assured is still alive) and on payment of all the premiums up to the receipt of such application and of interest thereon. Thus under a ten payment assurance for Rs. 10,000 upon which two annual premiums have been received by the company a paid-up policy for Rs. 2,000 will be issued, should the assured wish to discontinue payment of future premiums."

Plaintiff's counsel argued under this heading (although the plaint, even as amended does not ask for relief on this basis) that the client is entitled to be paid the surrender value. In regard to the claim to a paid-up policy the provisions of Cl. 7 have not been fulfilled. The application was not made within 12 months. It must be deemed to have been made on a view most favourable to the plaintiff on 23rd December 1926, when the amendment was ordered, that is to say, about 57 months after the default. Then again there has been no compliance of that part of the clause which requires that all premiums in arrear with interest shall be paid. The amount has not been tendered, it has not been brought into Court and the plaintiff even now does no more than merely express himself willing to make the payment on some future date. I need not pursue the inquiry, how far the doctrine that there is no place in mercantile contracts for the presumption that time is not of the essence of the contract applies to the plaintiff's claim, first, to a paid-up policy, secondly, in the alternative, to a cash payment, representing the surrender value; for granting, that time is not of the essence, each party has a right to have the contract performed within a reasonable time, according to the circumstances of each case. It is impossible to hold that the claim to a paid-up policy, which must be deemed to have been made for the first time after the suit was filed and after the lapse of more than four years from the date of default comes within the rule of "reasonable time." The claim to surrender value was made only during the course of the argument in this Court in second appeal, that is about nine years after default. The plaintiff, even granting as I have said that time is not of the essence, can get no relief in the circumstances.

Mr. K. P. Ramakrishna Aiyar next argues that the terms (vide Conditions

Nos. 6 and 7) requiring that as regards any claim to a paid-up policy or surrender value, application should be made within 12 months, are really stipulations for forfeiture in the nature of penalties and should be relieved against. For this position he relies upon *Steedman v. Drinkle* (4). In that case, certain land was agreed to be sold for 16,000 dollars of which 1,000 dollars were paid on signing the agreement and the balance was payable in six annual instalments on the 1st December of each year. The agreement provided that if the purchaser should make default in any of the payments the vendor should be at liberty to cancel the agreement and to retain as liquidated damages the payments already made. Default having been made in the payment of the first instalment the vendor cancelled the agreement. It was held that the forfeiture of the money paid was a penalty from which relief should be granted on proper terms. I fail to see how this case applies. The amount that under the agreement was to be forfeited there was the amount of the instalments already paid. In the present case, there is no doubt a clause of forfeiture, but that clause is Cl. 3; and what does that say?

"If payment is not made before expiration of the days of grace, the policy becomes void and all premiums paid in respect of it will be forfeited."

This is not the forfeiture I am asked to relieve against. Indeed as I have shown the clause that the policy shall lapse or that the premiums shall not be returned—each of them is strictly enforced. The premiums therefore become forfeited under that clause and no part of the premiums can be recovered. Forfeiting of the premiums is under Cl. 3 and no other clause. Cls. 6 and 7 do not relate to forfeiture but confer special advantages upon the insured. Those advantages he can claim only on fulfilling certain conditions. The plaintiff has not fulfilled them and can get no relief under those clauses.

Assuming that Cls. 6 and 7 are stipulations for forfeiture, I cannot hold that they are stipulations in the nature of penalties against which relief ought to be granted. What may be construed as a penalty in the case of an ordinary loan is not necessarily a penalty in the case of a Chit Fund transaction. That is the effect

(4) [1916] 1 A. C. 275=85 L. J. P. C. 79=32 T. L. R. 231=114 L. T. 248.

of *Vaithinatha Iyer v. Govindaswami* (5). It is there pointed out that in a case of a stake-holder of a chit his relation to the subscribers being of a special nature, special necessity exists justifying stringent provisions to protect his interest. The learned Judges observe:

"Without punctual payments by the individual subscribers, the stake-holder could not discharge his liabilities to the successful bidders as they arose."

Such remarks will apply with greater force to a contract of insurance. I am unable to hold that the conditions of the policy (in the language of that judgment) are unreasonable or are such as the parties might not naturally recognize should regulate the exceptional relations between them. The plaintiff therefore fails in his action and the suit is dismissed.

As regards costs I must say a word. I cannot help feeling that the Insurance Company would have done well by not insisting on their technical rights and refunding to the plaintiff some portion of the large sum of Rs. 1,712-8-0 received as premia. That, in the circumstances would be proper, was indicated by the trial Judge himself. He points out that in 1922 and 1923 the plaintiff was suffering from a malady which affected his mind. I therefore direct that as regards the costs in the two Courts below each party shall bear his own; but in the second appeal the plaintiff shall pay the defendant's costs.

P.R.S./R.M.

Suit dismissed.

(5) A. I. R. 1922 Mad. 67=67 I. C. 995.

A. I. R. 1932 Madras 245

WALLER AND PANDALAI, JJ.

(*Mallampudi*) Narayya and others — Defendants—Appellants.

v.

(*Mittapalli*) Sarayya and another — Plaintiffs—Respondents.

Second Appeal No. 1657 of 1926, Decided on 8th October 1931, against decree of Sub-Judge, Masulipatam, in A.S.No. 21 of 1926.

Civil P. C. (1908), O. 2, R. 2 — Mortgage debt repayable in ten instalments—Deed containing clause making whole amount exigible in default of two successive instalments — Suit to recover two instalments on their default decreed — Subsequent suit to recover balance is not barred by O. 2, R. 2.

A mortgage debt was repayable in ten annual instalments and the deed contained a clause which provided that if two successive instalments remained unpaid the mortgagor should without having regard to the future instalments pay all the amount and interest due in one instalment. Two

successive instalments fell into arrear and a suit brought for their recovery was decreed. A suit was subsequently brought for the recovery of the balance from the mortgagor and it was contended that the suit was barred by O. 2, R. 2.

Held : that the mortgagee had two courses open to him, either to enforce the penalty or to stand on the original deed and if he elected to adopt the latter course, it could not lie in the mouth of the mortgagor to meet his suit on the mortgage with the objection that he was barred because he did not adopt the former. The mortgagee's suit was not barred by O. 2, R. 2: 39 *Mad.* 981 and *A.I.R.* 1931 *Pat.* 285, *Foll.*; *A.I.R.* 1929 *Mad.* 371, *Appr.*; *A. I. R.* 1915 *All.* 189; *A. I. R.* 1923 *Bom.* 201 and *A. I. R.* 1928 *Mad.* 705, *not Foll.*; *A. I. R.* 1926 *P. C.* 85, *Rel. on.* [P 245 C 2, P 246 C 1]

G. Lakshmanan—for Appellants.

P. Satyanarayana Rao—for Respondents.

Judgment.—Defendant 1 in 1908 gave a mortgage to one Jagamma, who assigned it to plaintiff 1's natural father. The amount secured by the mortgage was Rs. 1,000 and it was repayable in ten annual instalments of Rs. 100 each, together with interest at 12 per cent. There was however a clause in the deed, which provided that, if two successive instalments remained unpaid, the mortgagor should

"without having regard to the future instalments, pay all the amount of principal and interest due in one instalment."

It is over the effect of this clause that controversy has arisen. Two successive instalments fell into arrear and the assignee mortgagee sued and obtained a decree for their recovery. This was in the Court of the Additional District Munsif, Masulipatam. In 1923 on 24th June his successor-in-title the present plaintiff 1, brought a suit to recover the whole balance due from the mortgagor and his sons. He was met with the plea that his suit was barred by R. 2, O. 2, Civil P.C. The cause of action, it was pleaded, arose when the first two instalments fell into arrear and he should have brought a suit for the whole amount due and not for two instalments alone. This plea found favour with the District Munsif, who, following two decisions of the Judicial Committee, dismissed the suit. The Subordinate Judge on appeal reversed his judgment and decreed the suit, pointing out that the two decisions relied on were in cases where suits had been filed after the entire mortgage money had fallen due. The same plea is now raised in second appeal. *Prima facie*, and apart from authority, it would seem clear enough that in a case of this kind, the mortgagee has two alternative

courses open to him; either to enforce the penalty, which would be advantageous to himself or to stand on the original deed, which would be rather to the advantage of the mortgagor. And if he elects to adopt the latter course, it cannot lie in the mouth of the mortgagor to meet his suit on the mortgage with the objection that he is barred because he did not adopt the former. The leading case on the point in this Presidency is *Narna v. Ammani Amma* (1).

The question then raised was one of limitation under Art. 132, Lim. Act, but the rule laid down is equally applicable to the present plea of bar by R. 2, O. 2. What was laid down was this that a mortgagee is not bound to take advantage of a penal clause in the bond and that a suit brought by him within 12 years from the date originally fixed for payment, though beyond 12 years from the date of the first default, was not barred by limitation. The rule has been dissented from in several Allahabad cases, beginning with *Gaya Din v. Jhumman Lal* (2) and in a Bombay case, *Srinivasa v. Chanbasapa* (3), but has been generally followed in Madras till recently. In *Mukyaprana Bhatta v. Kelu Nambiyar* (4), Ramesam and Jackson, JJ., held in respect of a bond very closely resembling that now under consideration, that the mortgagee having sued to recover the first four instalments in arrear, was barred by R. 2, O. 2 from suing to recover further instalments in arrear. Ramesam, J., who delivered the leading judgment, expressed it as his opinion that the Madras view was wrong and the Allahabad and Bombay view was right. At the same time, he thought that in certain cases where the deeds contained words like "when required" or "when you require" or "if you choose," it would be easy to hold that they did give an option to the mortgagees. As to that we agree with Venkatasubba Rao, J., in the next case to be cited that that is a distinction without any real difference; the option is there, whether it is expressed or not. The case in question is *Rego v. Phillip Taure* (5). The Judges composing the Bench, Ramesam and Venkatasubba Rao, JJ., arrived at the same result, but by absolutely different processes of reasoning. It

was the case of a mortgage which was to be discharged in four instalments, with a proviso that, if any instalment fell into arrear, the whole amount became recoverable. There were other provisions, but that is the general purport of the deed. The mortgagor defaulted on the first instalment and the mortgagee sued and got a decree for the amount due on it. Later he sued to recover the other instalments and was met with the plea that his suit was barred by R. 2, O. 2, Civil P. C. Ramesam, J., reviewed all the decisions and again expressed dissent from *Narna v. Ammani Amma* (1).

He, was able however, to find for the appellant on another ground. Venkatasubba Rao, J., agreed in allowing the appeal, but he did so on the ground that *Narna v. Ammani Amma* (1) had been correctly decided. It was on account of this difference in opinion that the present appeal was referred to a Bench. We may say at once that, in our judgment, Venkatasubba Rao, J., came to the right conclusion and we concur entirely in his observations on pp. 591 and 592 (of 56 M. L. J.)

"The matter 'he said' may be put somewhat thus: The plaintiff has an option to enforce the clause or not at his pleasure. It is open to him to avail himself of that option or to waive it and there is a third alternative, namely, it is equally open to him not to make election. He may by act or word show that he elects to avail himself of the benefit, and then he determines his election for ever. He may similarly indicate that he waives the option, and in that case again, he cannot afterwards change his mind. Then there is the third alternative, where he makes no election, retaining the right either to exercise the power or to waive it and this he may retain till the suit is filed. Construing O. 2, R. 2 in the light of this principle, it cannot be said of a person, that on the date of the first suit he became entitled to sue for the whole amount, unless he had previously elected by some word or act to take advantage of the default clause. If he had previously done nothing, that is, made no election, the act involved in bringing in the first suit for a single instalment amounts to a waiver on his part of the benefit reserved under that clause. If, again, after the default has occurred, he keeps the question open and does nothing, but finally sues for the whole amount, the fact that he so sued, shows that he has waived the benefit reserved by him under the contract."

He referred to two decisions of the Judicial Committee as tending to support his view. One of them, *Pancham v. Ansar Hussain* (6), was pronounced in an appeal from a judgment of the Allahabad High Court reported in *Pancham v. Ansar*

(1) [1910] 29 Mad. 581=15 I. C. 418.

(2) A. I. R. 1915 All. 189=37 All. 400 (F.B.).

(3) A. I. R. 1923 Bom. 201=72 I. C. 290.

(4) A. I. R. 1928 Mad. 705=112 I. C. 270.

(5) A. I. R. 1929 Mad. 371=56 M. L. J. 580.

(6) A. I. R. 1926 P.C. 85=99 I. C. 650=53 I. A. 187=48 All. 457 (P.C.).

Hussain (7). It is true that the observations relied on were made obiter, and that their Lordships of the Judicial Committee were careful to point out that they were not deciding that the view of the Allahabad High Court was wrong, but it is, we think impossible to read what they said without feeling that they entertained the gravest doubt as to the correctness of that view. To quote from p. 463 (of 48 *All.*) "applying certain previous decisions of that Court and in particular a Full Bench decision in *Gaya Din v. Jhumman Lal* (2), the High Court held that, under a clause in the above form, a single default on the part of the mortgagors without any act of election, cancellation or other form of response or acceptance on the part of the mortgagees, and even, it would appear, against their desire operates eo instanti, to make the money secured by the mortgage "become due," so that all right of action in respect of the security is finally barred 12 years later. All this the High Court held, notwithstanding that the mortgage is for a term certain, a provision which may be as much for the benefit of the mortgagees as of the mortgagors, and notwithstanding that the proviso is exclusively for the benefit of the mortgagees. The decision also apparently proceeds upon the view that the words of the English Limitation Act and the English decisions thereon apply without question to the words of Art. 132, Lim. Act, a conclusion which, as it seems to their Lordships, may involve and on the critical point when applied to such a proviso as the present, a large assumption."

It is significant that in *Narna v. Ammani Amma* (1) Seshagiri Ayyar and Napier, JJ., pointed out that some of the Indian decisions seemed to have taken it for granted that the words of Art. 75 should be imported into Art. 132, an assumption which they condemned as unsound. We will refer to only one other Indian case *Mukhdeo Singh v. Harakh Narayan Singh*, A. I. R. 1931 Pat. 285, where the Judges, following the course of decisions in that Province, held:

"(A) that, where an instalment mortgage deed fixed the time by which the mortgage money and interest thereon were to be paid and a clause was inserted, for the benefit of the mortgagee, that, if any of the instalments due were not paid in time, the mortgagee would be at liberty to call in the entire money, the effect of such a stipulation was that he had successive or recurring causes of action and it was left to his option to avail himself of any one of them."

"(B) that the mortgagee's option to call in his money at once or to stand on the original contract need not be express, but can be implied from the terms of the bond."

In the result, we must follow the ruling in *Narna v. Ammani Amma* (1) and the course of decisions in this Court and hold that, in this case, the plaintiff's suit was

not barred by R. 2, O. 2, Civil P. C. He was under no obligation to enforce the forfeiture; for no man is obliged to enforce a forfeiture. The second appeal is dismissed with costs.

P.R.S./P.N. *Appeal dismissed.*

* A. I. R. 1932 Madras 247

BEASLEY, C. J. AND CORNISH, J.

A. M. M. Murugappa Chettiar—Appellant.

v.

Arangaraja Kumaranandaswami and another—Respondents.

Second Appeals Nos. 7 and 8 of 1929, Decided on 30th October 1931, against decision of Kumaraswami Sastri, J., D/- 21st December 1928, in C. S. No. 608 of 1927.

* **Trusts Act (1882), S. 88—Person standing in fiduciary relationship placing money in breach of that trust in hands of another—Person for whom money is held can get it from that other person.**

P, being the founder and head of a certain mutt, and with a view to create an endowment for that mutt, collected subscriptions from several persons and the amounts so collected were paid to the makers of four hundies in favour of P. P endorsed those four hundies to R with instructions to him to realize the amount thereof and to invest the amount so collected on P's behalf and on account with a firm N. R however put the money into his own account in the firm and not to the credit of P. P thereupon brought a suit against firm N for recovery of the amount realized and standing in the account of R.

Held: that R stood to P in a fiduciary relationship and he was guilty of a breach of trust and consequently P could follow the money and get it from firm N. *Burdick v. Garrick*, (1870) 5 Ch. 233; *Knatchbull v. Hallet*, (1880) 13 Ch. D. 696 and *Sinclair v. Brougham*, (1914) A. C. 398, Rel. on. [P 250 Q 2]

The Advocate General, S. Parthasarthy and V. K. Thiruvengkatachari—for Appellant.

M. Patanjali Sastri, R. Narasimha Ayyangar, S. Duraiswami Aiyar and K. S. Rajagopala Ayyangar—for Respondents.

Beasley, C.J.—These are appeals from a judgment of Kumaraswami Sastri, J., decreeing the suit under appeal in favour of the plaintiff. The plaintiff is a pandaram; defendant 1 is a banker carrying on business in Madras; and defendant 2 is a minor defending by his mother and guardian and the son of one S. M. R. M. Ramanathan Chettiar of Pallathur who died some years ago. The plaintiff is the founder and head of a mutt at Karaikal known as the Sriman Swami Mutt. With

a view to create an endowment for that mutt, the plaintiff collected subscriptions from several persons and the amounts so collected were paid to the makers of four hundies in favour of the plaintiff. The aggregate sum of those four hundies is Rs. 11,996-7-6. In December 1925 the plaintiff endorsed those four hundies to defendant 2's father Ramanathan Chettiar with instructions to him to realize the amount thereof and invest the amount so collected on the plaintiff's behalf and account with a respectable Nattukottai Chetti firm in Madras for interest according to the Madras Nadappu rate for six months' tavanai. Ramanathan Chetty, it is alleged in the plaint, acting on behalf of the plaintiff, endorsed the hundies in favour of defendant 1, who agreed to collect the amounts of the hundies for the benefit of the plaintiff. The plaintiff, accordingly, having without success made demands upon defendant 1 for payment of the money so collected and thought by him to be standing in his account with defendant 1, sued defendant 1 for that amount.

Defendant 1 filed a written statement in which he set up the case that Ramanathan Chetty delivered the hundies to him with instructions to collect the amounts thereof and credit them to his own account and that accordingly he collected the amounts and duly credited them to the account of Ramanathan Chetty. He contended that the hundies in question were delivered to him as the property of Ramanathan Chetty and that according to his instructions they were dealt with on the footing that they were his property. He pleaded that there was no privity of contract between him and the plaintiff and contended that the plaintiff's remedy, if any, was against Ramanathan Chetty or his heirs. In consequence of this written statement, defendant 2 by his guardian was brought upon the record as a defendant; and in defendant 2's written statement the case put forward was that the plaintiff did not collect the money represented by the hundies as a trustee of the mutt, but that he did so at the request of Ramanathan Chetty who gave him letters of recommendation to his friends and that the money collected was collected for Ramanathan Chetty who was the trustee of the money to be applied by him for the purposes of the mutt though the case was subsequently

developed at the trial that he was the trustee of the mutt. Defendant 2's case therefore was that Ramanathan Chetty was the trustee of the money and that the plaintiff had no right whatever to the funds beyond merely the collection of them on Ramanathan Chetty's behalf. It was admitted that the money realised on the hundies was credited to Ramanathan Chetty's account with defendant 1. Defendant 2 also denied that the plaintiff was the founder or head of any mutt or charities in the name of Sriman Swami in Karaikal. In the last paragraph of his written statement defendant 2 pleaded that the Court had no jurisdiction to entertain the suit as no part of the cause of action as against defendant 2 arose in Madras and that even if a part of the cause of action had arisen in Madras, no leave of the Court to sue in Madras, had been obtained.

The learned trial Judge after a very careful trial of the suit gave judgment in favour of the plaintiff holding that he had collected the money in question as the head of the mutt and on behalf of the mutt, that defendant 2's contentions that Ramanathan Chetty was the trustee for the money and that the plaintiff was making collections on his behalf and under his directions, were untrue and that defendant 1 was liable to have the suit decreed against him because Ramanathan Chetty was in a position of trust to the plaintiff and enjoying that fiduciary relationship, and in breach of his trust had paid the money into his own account and the plaintiff was therefore entitled to follow it and get it from defendant 1. It is not clear from the very careful judgment of the trial Judge whether he intended to do more than make defendant 2 liable as pro forma defendant. Defendant 2, it is quite clear, was made a party only because of the defence raised by defendant 1 in his written statement. It seems to have been thought necessary by the plaintiff's legal advisers to make defendant 2 a party to the suit so that the rights of all the parties could be properly determined; and the right of the plaintiff 1 even in the absence on the record of defendant 2 to follow the money into the hands of defendant 1 under the circumstances of the case, appears not to have been appreciated by the plaintiff's legal advisers. Consequently, both in the trial Court and before us, a great deal of time was taken up

by a discussion of the question of the jurisdiction of the Court to entertain a suit against defendant 2. Mr. S. Doraiswamy Ayyar however did not take up the position that it was necessary to have defendant 2 before the Court, his contention being firstly that on the evidence the relationship between the plaintiff and Ramanathan Chetty was a fiduciary one, and secondly that Ramanathan Chetty was guilty of a breach of trust in putting the money realized on the hundies into his own account and therefore the legal position was that the plaintiff was entitled to get that money back from defendant 1.

Accordingly we think it quite unnecessary to decide the point as to jurisdiction. That was decided in the lower Court in favour of the plaintiff; but in view of the fact that Mr. Doraiswamy Ayyar did not support that finding, it only remains for this Court to say that it would appear that the lower Court had no jurisdiction to entertain the suit as against defendant 2. Therefore so far as defendant 2's appeal is concerned, it must be allowed though it must be observed that defendant 2 took no steps whatever to have the decree, when drawn up, posted 'to be spoken to on minutes' before the learned Judge, set right any errors or doubt therein but has come straight here instead. In view of the fact that most of the time in the Court below was taken up in a consideration of the case set up by defendant 2, which was found to be untrue, in my opinion, defendant 2 is not entitled to his costs either here or in the Court below. Since however the decree as it stands makes defendant 2 liable to pay costs, that part of it will be amended and the order substituted that defendant 2 will bear his own costs.

It is now necessary to consider defendant 1's appeal and whether the learned trial Judge was right in coming to the conclusion that the relationship between the plaintiff and Ramanathan Chetty was a fiduciary one. The learned trial Judge has obviously given the most careful consideration to this aspect of the case as indeed he has to the case in its other aspects and, in my opinion, it would be impossible to come to a different conclusion. There is not a single document in the case which in any way supports defendant 2's case set out in his written statement that Ramanathan Chetty was the

trustee of the money. There is not a single document either which supports his case subsequently developed at the trial, namely, that Ramanathan Chetty was the trustee of the mutt. On the contrary the documentary evidence is strongly in favour of the plaintiff's claim. Some letters written by the plaintiff to Ramanathan Chetty were made use of by defendant 2, it being contended that the language employed by the plaintiff therein showed him to be a person who was the servant of Ramanathan and collecting the money in question under his instructions. As the learned trial Judge, with his great knowledge of the people in these parts, points out, no particular significance can be placed upon such words as "uttiravu" (order) and "Adiyan" (my humble self), words used by the plaintiff in the letters in question. As he says :

"Nobody who knows the way of these pandarams and the generally obsequious tone that is adopted by persons who want the favour of well-to-do persons whom they approach and the generally hyperbolic language in which a person who addresses another seeks to demean himself and exalt other persons can have any difficulty in arriving at the conclusion that no such inference can be drawn from the formal language of a person who addresses himself as a servant that he is really a servant."

Nor can it be said that these letters show that the collections were being made by the plaintiff on Ramanathan Chetty's behalf. On the contrary, when the money collected in Rangoon by the plaintiff—he travelled there amongst other places for the purpose of collecting money—was brought by him to India, it was invested with the S. M. V. firm; and whilst there, there is no suggestion that anybody else had any interest in that money. It is credited there as the plaintiff's money. Nobody else used that money. Payments were made to the plaintiff and when the money was transferred to another firm the transfer was made at the instance of the plaintiff. It is clear from the letters in the case that the plaintiff had had a great deal of trouble in getting the money out of the hands of the S. M. V. firm and was writing to Ramanathan Chetty in order to get Ramanathan Chetty to use his influence in order to make the S. M. V. firm pay the money out. It is quite unnecessary to go into the evidence on this part of the case in any detail because it has been so very carefully discussed in the judgment of the learned trial Judge.

It is sufficient to say, as I have already before stated, that it is impossible to differ from the learned trial Judge's conclusions on this part of the case and to add that defendant 2's case is obviously a false one. It is clear therefore that the plaintiff was collecting money for the mutt at Karaikal, that having collected this large amount, he got four hundies in which he was named the payee, endorsed them over to Ramanathan Chetty not so as to give Ramanathan Chetty any right to the money but because Ramanathan Chetty was to negotiate the hundies for the plaintiff and pay the money into the plaintiff's account which Ramanathan Chetty was to open with some respectable firm in Madras.

The money was entrusted to Ramanathan Chetty for that purpose and in putting the money into his own account he was guilty of a breach of trust and any difficulty there might have been in identifying this money after it got into the hands of defendant 1 is removed by reason of the fact that Ramanathan Chetty had two accounts with defendant 1, viz., a tavanai account and a tanathu account. The latter was an account of Ramanathan Chetty's own dealings. The former account was opened in order to pay into it the realizations from the hundis and there the money remained. The legal position is perfectly clear. The first case to which reference must be made is *Burdick v. Garrick* (1). There an agent, who was a solicitor in London, held a power of attorney from his principal in America to sell his property and invest the proceeds in his name. The agent received certain moneys under the power and paid them into his own bankers to the general account of his firm. The principal died in 1859 intestate. In 1867 his widow took out administration to his estate, and in 1868 she filed a bill against the agent for an account. The Statute of Limitations was pleaded but it was held that the agent held the money in trust for his principal, and therefore the Statute of Limitations was no bar to the suit. On p. 240, Lord Hatherley, L. C., says :

"In the present case we have an agent who is entrusted with those funds, not for the purpose of being remitted when received to the principal, but for the purpose of being employed in a particular manner in the purchase of land or stock; and which moneys the factor or agent is bound to

keep totally distinct and separate from his own money; and in no way whatever to deal with or make use of them. How a person who is entrusted with funds under such circumstances differs from one in an ordinary fiduciary position I am unable to see."

It is clear from this decision that Ramanathan Chetty stood to the plaintiff in a fiduciary relationship. Next it has to be seen whether money placed by a person in fiduciary relationship in breach of trust in the hands of another can be got back from that other person; and here we have the authority of the well-known case of *In re Hallett's estate; Knatchbull v. Hallett* (2), where it was held that if money held by a person in a fiduciary character, though not as trustee, has been paid by him to his account at his bankers, the person for whom he held the money can follow it, and has a charge on the balance in the bankers' hands. In a later case, *Sinclair v. Brougham* (3), the principle in *In re Hallett's estate* (2) was applied. It is quite clear that the plaintiff was entitled in the lower Court to succeed in his claim against defendant 1 and therefore defendant 1's appeal must be dismissed with costs.

Cornish, J.—I concur.

P.R.S./P.N.

Appeal dismissed.

(2) [1880] 13 Ch. D. 696=49 L. J. Ch. 415=42 L.T. 421=28 W.R. 732.

(3) [1914] A.C. 398=83 L. J. Ch. 465=111 L. T. 1=58 S.J. 302=30 T.L.R. 315.

A. I. R. 1932 Madras 250

WALLER AND PANDALAI, JJ.

(*Konchada*) Nilakanta Subudhi—Plaintiff—Appellant.

v.

Sri Sri Sri Ramachandra Deo (minor)—Defendant—Respondent.

Appeals Nos. 212 and 374 of 1926, Decided on 28th August 1931, against orders of Dist. Judge, Ganjam, D/- 25th January 1926.

(a) Civil P. C. (1908), O. 21, R. 2—Person obtaining decree for monthly allowance subsequently adjudicated insolvent—Uncertified payments by judgment-debtor of sums falling due after adjudication cannot be recognized as against receiver—Provincial Insolvency Act (1920), S. 28 (4).

A held a power of attorney from B to execute a decree for a monthly family allowance obtained by B against C. B subsequently became insolvent. C made certain payments to B subsequent to his adjudication, but they were not certified to the Court executing the decree according to O. 21, R. 2. On execution being taken up by the receiver it was contended by C that he ought to get credit for payments made subsequent to B's insolvency.

(1) [1870] 5 Ch. 233=39 L. J. Ch. 369=18 W. R. 387.

Held: that the decree having become vested in the receiver as from the date of adjudication none of the payments made subsequently could be recognized as against the receiver if for no other reason than that none of them was certified to the Court under O. 21, R. 2. [P 252 C 1]

(b) **Provincial Insolvency Act (1920), S. 28**

(4)—Sums periodically falling due under right already acquired, such as allowance, are not after acquired property in respect of instalments falling due after insolvency.

Sums periodically falling due under a right already acquired such as an annuity or an allowance or instalments due on an instalment bond or decree can hardly be treated as after-acquired property in respect of instalments falling due after the insolvency. The right under which such payment is claimed is acquired before the insolvency though some of the instalments fall due after it. [P 252 C 1]

(c) **Provincial Insolvency Act (1920)—Scope — Presidency Towns Insolvency Act (1927)—English Bankruptcy Act (1914).**

In neither the Provincial Insolvency Act nor the Presidency Towns Insolvency Act is there anything corresponding to S. 47, English Bankruptcy Act, 1914. [P 253 C 1]

K. Kuttikrishna Menon—for Appellant.

B. Jagannadha Das—for Respondent.

Judgment.—Appeal Against Order No. 212 of 1926 is from an order of the District Judge of Ganjam dismissing a petition, E. P. No. 16 of 1924, by the appellant as holder of a power-of-attorney from one Durga Mahadeva Deo to execute the decree in O. S. No. 7 of 1887 obtained by Durga Mahadeva Deo against the Zamindar of Bhodokimidi, the appellant in A. A. O. No. 374 of 1926, whereby the decree-holder became entitled to a family allowance of Rs. 173 per month from the zamindar. The decree-holder became heavily indebted to several persons of whom the appellant in A. A. O. No. 212 is one and the Vuna family was a previous creditor. To pay off the appellant's debt he executed to the appellant on 22nd July 1920 a transfer of the arrears of the allowance till then due and also a power-of-attorney of even date empowering the appellant to execute the decree and retain one-half of the sums realized towards his debt and pay over the balance to the transferor. The Vuna lender had obtained a somewhat similar right under an instrument of 1916. On a contest between the Vuna lender and the present appellant it was held by the Court in January 1924 in C. M. A. Nos. 324 and 325 of 1922 that the appellant is entitled to execute the decree; but it was left to the lower Court to decide what rights the former lender (Vuna)

would be entitled to out of the sums realized. Durga Mahadeva Deo was adjudged insolvent on 19th August 1923 during the pendency of those appeals. When the appellant again applied in March 1924 to execute the decree and realize the allowance due till then, he was again met by the objection raised by the receiver and by the Court of Wards, representing the zamindar, that he is not entitled to execute the decree after the date of the insolvency of Durga Mahadeva Deo and by reason of it. The learned District Judge upheld this objection and dismissed the appellant's petition.

The matter in dispute in this appeal has been settled by arrangement. It is agreed that the appellant Konchada is entitled to execute the decree and realize the balance of the allowance due under the decree from 15th January 1918 to 15th March 1923, just before the insolvency. The mutual rights of the appellant and the Vuna lender who is not a party to these appeals to this sum must be determined by the lower Court after notice to him. The order of the lower Court dismissing the execution petition is therefore set aside and the lower Court will proceed with and dispose of it in accordance with the above direction. The question of set-off raised by the zamindar, but which has not been gone into will also be dealt with by that Court. There will be no other order as to costs except that the receiver will have his costs out of the estate.

The appeal, A. A. O. No. 374, is from an order of the District Judge allowing execution of the same decree by the receiver in E. P. No. 6 of 1926, in respect of sums which accrued due from 15th March 1923 to 15th February 1926 and disallowing the objection of the Court of Wards on behalf of the zamindar that he ought to get credit for certain payments made to Durga Mahadeva Deo from 14th April 1923 to 7th April 1925. The Court allowed only the two payments into Court, i. e., Rs. 166-12-0 on 16th January 1924, and Rs. 1,211 on 12th April 1926.

The ground on which the other payments which were made direct to the decree-holder were disallowed by the learned District Judge was that the Court of Wards was informed by the order of Mr. Reilly, then District Judge, dated 9th August 1923 that Durga Madhava Deo having been adjudged insolvent, he was not authorized to re-

ceive any payments under the decree and that the Court of Wards should not make such payments to him. It is argued for the appellant zamindar that four of the payments amounting in all to Rs. 674 were made before the said order in good faith to the decree-holder and that even as to the 20 subsequent payments amounting in all to Rs. 3,370 the appellant made them bona fide as the petition I. A. No. 204 of 1923 in which the above observations were made was formally dismissed on the ground that the Court of Wards was not a party in the insolvency proceedings. It is argued that the monthly allowance which accrued due after the insolvency is after-acquired property of the insolvent and that as to such property bona fide payments to the debtor made before the receiver intervenes are protected. A large number of decisions of the English and Indian Courts on this topic have been cited.

All these payments made to the decree-holder on behalf of the zamindar-judgment-debtor are payments in satisfaction of the decree which were not as far as the records show certified to the Court executing the decree as they should have been under O. 21, R. 2. The consequence of this is that they cannot be recognized by the Court executing the decree: O. 21, R. 2 (3). The decree having become vested in the receiver as from the date of adjudication, 19th March 1923, and all the payments now relied on being on and after 14th April 1923 none of them can be recognized as against the receiver if for no other reason than that none of them was certified to the Court. As this point though lost sight of in the argument, is conclusive of the appeal, if correct, the question whether the payments can be supported as bona fide dealings by the insolvent with his after-acquired property before the intervention of the receiver does not arise.

Another point is that sums periodically falling due under a right already acquired such as an annuity or allowance, or instalments due on an instalment bond or decree can hardly be treated as after-acquired property in respect of instalments falling due after the insolvency. The correct view appears to us to be that the right under which the payments are claimed was acquired before the insolvency though some of the instalments fall due after it. If it were otherwise, every insolvent would be able to collect and

appropriate all his debts that had not fallen due before the insolvency.

But as the question has been strenuously argued, we must point out that 20 out of the 24 payments, i.e., those made after Mr. Reilly's order cannot in any view claim any protection as in the circumstances they cannot be said to have been made bona fide. That order was made on a petition by the appellant in A. A. O. No. 212, one of the creditors in the insolvency who had in addition by reason of the power of attorney a direct interest in the proceeds of the decree, praying for an order against the zamindar represented by the Court of Wards directing him not to pay the allowance to the insolvent. The reason why the petition was dismissed was a formal one, i.e., that the zamindar was not a party to the insolvency proceedings. He was only a judgment-debtor of the insolvent. But the learned Judge made his meaning perfectly clear when he said that it may be presumed that the Court of Wards will not fail in its duty to the minor zamindar and that if any instalment of the allowance is paid to the insolvent instead of to the receiver or into Court, the zamindar will not be discharged from his liability for it. He added that the insolvent will make himself liable to punishment under the Provincial Insolvency Act if he collects and appropriates any instalment of the allowance. It is idle to contend that after this clear intimation by the Court, anyone could have thought that he could validly pay the allowance to the insolvent and if such payment was made, it certainly cannot claim to have been made bona fide. This applies as already stated to 20 payments aggregating to Rs. 3370. It is only with regard to the first four payments made between 14th April 1923 and 3rd July 1923 that any question of bona fide can arise. Even these payments were made during the pendency of C. M. A. Nos. 324 and 325 of 1922 in which the two creditors of the insolvent were contending for the right to execute the decree and to which the zamindar through the Court of Wards was a party. It is difficult to resist the inference that payments made after the insolvency in the above circumstances were made to defeat the creditors.

There are several decisions under the Insolvency Act, 1848, which apply to S. 7 of the Act the doctrine enunciated in

Herbert v. Sayer (1) and *Cohen v. Mitchell* (2), *Kerakoose v. Brooks* (3), *Alimahamed Abdul Hussein v. Vadilal Devchand* (4), *Dasarathy Sinha v. Mahamulya Ash* (5), *Chhote Lal v. Kedar Nath* (6) and extend it to immovable property *Krishtocomul Mitter v. Suresh Chunder Deb* (7), *Sriramulu Naidu v. Andalammal* (8), *Alimahamed Abdul Hussein v. Vadilal Devchand* (4). The matter is now governed in England by S. 47 (1), Bankruptcy Act, 1914. There is also a considerable body of judicial opinion, not without dissent, that the same extended doctrine holds good under the Provincial Insolvency Act. Both under the old Act of 1907 and under the present Act of 1920, S. 28 (4) after-acquired property of an insolvent vests "forthwith" in the Court or receiver. There is no similar expression in the corresponding Ss. 17 and 52 (2) (a), Presidency Towns Insolvency Act 1909, which deals with the vesting of after-acquired property.

In neither Indian Act is there anything corresponding to S. 47, English Act 1914. Several decisions have however held the doctrine of *Cohen v. Mitchell* (2), applicable under the Provincial Insolvency Act also: *Nagindas Bhukandas v. Ghelabhai Gulabdas* (9), *Jagadish Narain Singh v. Ramsakal Kuar* (10) *Ramanadha Iyer v. Nagendra Ayer* (11). The Rangoon High Court takes a contrary view. *Ma Phaw v. Maung Ba Thaw* (12). In this Court there appears to be some difference of opinion *Rowlandson v. Champion* (13). *Abdul Kareem Sahib v. The Official Assignee of Madras* (14). *Ratna Rai v. The Official Assignee of Madras* (15). Were it necessary to decide the question, we would have preferred to send the matter to a Full Bench. But we do not think it neces-

sary to pronounce any opinion on the question argued. It is agreed that in addition to the sums allowed by the lower Court, this appellant should have credit for Rs. 135 being the income-tax paid by him to Government. With the above modification A. A. O. No. 374 of 1926, must be dismissed with costs.

P.R.S./R.M. Order accordingly.

* A. I. R. 1932 Madras 253

JACKSON AND CURGENVEN, JJ.

Ravanappa Reddi—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 442 of 1931, Decided on 10th November 1931.

* Criminal P. C. (1898), Ss. 195 (1) (b) and 476 — Complaint by private person under S. 193, Penal Code is not cognizable and conviction based on such complaint is not protected by Ss. 537 and 532 and should be set aside—Criminal P. C. (1898), Ss. 532 and 537.

Where a complaint was filed against the accused by a private complainant alleging that the accused had fabricated a pro-note and induced a third person to file a suit against the complainant so as to obtain a fraudulent decree:

Held: that the Court confronted with a complaint like the above by a private person and not preferred under S. 476 must refuse to take cognizance and it could not even examine the complainant upon oath and then note that it was only taking cognizance of the offences not referred to in S. 195, because the examination of the complainant on oath under S. 200 is after cognizance has been taken.

Held further: that the lower Court having proceeded upon no legal complaint at all in convicting the accused the error could not be corrected under S. 537, nor had S. 532 any relevancy to the matter, for that only validates commitments legal in themselves but made by a Magistrate not empowered to commit. A. I. R. 1929 Mad. 21, Ref. [P 254 C 1]

A. S. Sivakaminathan—for Appellant.

K. N. Ganapathi—for the Crown.

Jackson, J. — The appellant has been sentenced to three years rigorous imprisonment for abetting the forging of a promissory note.

On the facts there seems to be no doubt that the appellant is guilty under Ss. 467 and 109, I. P. C. The evidence of the Christian schoolmaster P. W. 9 proves that the accused asked him to write the draft of the promissory note, Ex. C, after the death of its alleged maker Krishna Reddi, obviously for the purpose of fraudulent execution.

Section 467 has no necessary connexion with any Court proceeding, and when the committal order came before me upon an application to have it cancelled, I declined to interfere as there was sufficient evi-

(1) [1843] 5 Q. B. 965=2 D. & L. 49 = 13 L. J. Q. B. 209=8 Jur. 812.

(2) [1890] 25 Q. B. D. 262.

(3) [1859-61] 8 M. I. A. 339 = 1 Suth. 426 = 1 Sar. 778 (P. C.).

(4) [1919] 43 Bom. 890=53 I. C. 197.

(5) [1920] 47 Cal. 961=60 I. C. 977.

(6) A. I. R. 1924 All. 703=84 I. C. 289=46 All. 565.

(7) [1882] 8 Cal. 556=12 C. L. R. 253.

(8) [1907] 30 Mad. 145=17 M. L. J. 14.

(9) A. I. R. 1920 Bom. 58=44 Bom. 673.

(10) A. I. R. 1929 Pat. 97=114 I. C. 465=8 Pat. 478.

(11) A. I. R. 1924 Mad. 223=76 I. C. 805.

(12) A. I. R. 1926 Rang. 179 = 97 I. C. 221 = 4 Rang. 125.

(13) [1894] 17 Mad. 21.

(14) [1905] 28 Mad. 168.

(15) [1915] 29 I. C. 168.

dence to establish a prima facie case against the accused. But now that the whole record is before us, the matter is not quite so simple. In the complaint Ex. J, it is alleged that the accused fabricated a pro-note and induced one Vatta Goundan to file a suit against Krishna Reddi in the Panchayat Court, and obtained a fraudulent decree. The complainant was ignorant of all this until the execution of the decree was begun in the District Munsif's Court. . . .

"The object of bringing about these forged and fabricated transactions is to get the house of the late Krishna Reddi."

This is clearly the offence under S. 193, I. P. C. of fraudulently fabricating false evidence for the purpose of being used in a stage of a judicial proceeding.

The Court may think the forgery a clearer count than the fabrication of evidence because on the facts of this case it is doubtful if there was any proceeding before the panchayat at all, but nevertheless the allegation is plainly stated in the complaint, and it is the allegation which attracts the mischief of S. 195 (1) (b), Criminal P. C.

A Court confronted with a complaint like Ex. J by a private person and not preferred under S. 476, Criminal P. C. must refuse to take cognizance. It cannot even examine the complainant upon oath and then note that it is only taking cognizance of the offences not referred to in S. 195, Criminal P. C.; because the examination of the complainant on oath under S. 200 is after cognizance has been taken. But nothing of that sort was attempted in this case. The Court recorded a short sworn statement, and evidently took cognizance of every offence alleged in the written complaint.

The effect of this is that the Court proceeded upon no legal complaint at all; which is much more than a mere irregularity in the complaint. Therefore the error cannot be corrected under S. 537, Criminal P. C. nor has S. 532 any relevancy to the matter; for that only validates commitments legal in themselves but made by a Magistrate not empowered to commit.

In these circumstances the conviction must be set aside as being without jurisdiction. The bail is released.

Curgenven, J.—S. 195 (1) (b) of the Code forbids a Court to take cognizance of an offence under S. 193, I. P. C. when it

is alleged to have been committed in, or in relation to, any proceeding in any Court, except upon the complaint of that Court. Such an offence, so committed, is undoubtedly alleged in the complaint in the present case, and indeed the section of the Penal Code is quoted. The Court was precluded from taking cognizance of that offence, the complaint being a private one. The conviction was actually of abetment of forgery of a valuable security, under Ss. 467 and 109, I. P. C., but in *P. Muthirian v. Vengu Aiyar* (1), I have already given my reasons for holding that, this being only another way of dealing with what was in effect the same offence—fabricating false evidence—it is not open to a Court to permit the provisions of S. 195, Criminal P. C. to be evaded in this manner. I agree therefore that upon this ground the conviction must be set aside, the proceedings being without jurisdiction.

P.R.S./K.N.

Order accordingly.

(1) A. I. R. 1929 Mad. 21=114 I. C. 360=30 Cr. L. J. 322.

* A. I. R. 1932 Madras 254

WALLER AND PANDALAI, JJ.

(*Padmanabhini*) *Ramanamma*—Complainant—Petitioner.

v.

Golusu Appalanarasayya—Accused 1—Opposite Party.

Criminal Revn. No. 329 of 1931 and Criminal Revn. Petn. No. 297 of 1931, Decided on 20th November 1931.

* **Evidence Act (1872), Ss. 40 to 43—R convicted of defamation—Civil suit for damages dismissed—High Court in revision setting aside conviction and ordering retrial—R trying to put in evidence judgment of civil Court as conclusive of his innocence—Such judgment held not admissible in evidence.**

Although the civil suit and the prosecution may be based on exactly the same cause of action, the parties are strictly speaking not the same, the burden of proof is differently placed and different considerations may come in. The result may therefore be a conflict in decision; but such a conflict is one that is inherent in the division of causes into criminal and civil.

R was charged with the offence of defamation and convicted. The complainant then sued R in damages for defamation but the suit was dismissed. Subsequently the High Court in revision set aside the conviction and ordered a retrial. The trial ended in a conviction, but the Sessions Judge in appeal held the judgment of the civil Court put in evidence by R to be conclusive proof of his innocence.

Held: that the matter was governed by Ss. 40 to 43 and that the judgment relied on by the Sessions Judge was not admissible in evidence under any of the relevant sections of the Act: 41

Bom. 1, not Foll.; A. I. R. 1927 Mad. 308, Appr.; A.I.R. 1924 Mad. 516, Expl.

[P 255 C 2; P 256 C 1, 2]

V. Krishnamachariar—for Petitioner.
Public Prosecutor—for the Crown.

Order.—This case has had a somewhat remarkable history. The petitioner charged the respondent, his wife and others with the offences of robbery and defamation. Ultimately the respondent alone was convicted of the latter offence and his conviction was upheld by the Sessions Judge in appeal. The petitioner then filed a suit for damages for defamation against the respondent and another person. A copy of the judgment confirming the conviction was produced, but the District Munsif held, quite rightly, that he was not bound to follow it and that he had to arrive at a decision independently on the evidence before him. In the result, he dismissed the suit. The next thing that happened was that this Court, in revision, set aside the conviction and ordered a retrial. The case was retried and ended again in the conviction of the respondent. The latter tried to get admitted in evidence a copy of the judgment of the civil Court, but the Magistrate rejected it, being of opinion that it was irrelevant for the purpose of the trial. An appeal was again preferred, which was on this occasion successful. The Sessions Judge set aside the conviction, holding that the Munsif's judgment was not merely relevant, but also conclusive proof of the respondent's innocence. To the material sections of the Evidence Act, which lay down the law as to the admissibility of judgments, he made no reference. It would be interesting to know how he would have dealt with the matter, if the judgment had been one awarding damages against the respondent. We venture to doubt whether he would have gone so far as to hold that it was conclusive proof of the respondent's guilt and that the Magistrate should at once have convicted him on it, without any further evidence. And yet, if a judgment one way might be conclusive proof of the respondent's innocence, it is not apparent why a judgment the other way, should not be conclusive proof of his guilt.

What the Sessions Judge relied on was a judgment of the Bombay High Court, reported in *In re Marker* (1). Marker was prosecuted for breach of trust in re-

gard to certain sums of money. He had already been sued civilly for recovery of those sums, but the suit had been dismissed. A copy of the civil Court's judgment was produced before the Magistrate, who declined to admit it in evidence, holding, with reference to Ss. 40 to 43, Evidence Act, that it was irrelevant and inadmissible. The matter was taken up to the High Court, which decided, without any reference to those sections, that the judgment should have been admitted. The Judges did not actually say, in so many words, that it was conclusive proof of Marker's innocence; indeed, Heaton, J., conceded that it could not be used to prove or disprove the facts in dispute in the case. But it is impossible not to agree in the Sessions Judge's observation that the whole tenor of their argument indicates that, in their opinion, it ought to have been treated as conclusive proof and that on it, Marker should, at once, have been discharged by the Magistrate. If however it was not to be used to prove or disprove the charge, it is difficult to see on what ground the Magistrate could have acted on it, as if it were conclusive. With great respect, we cannot follow this decision. The matter, it seems to us, is governed by Ss. 40 to 43, Evidence Act, and, if a judgment is not admissible under any of those sections, it must be left out of consideration altogether. The judgment in question was not one to which S. 40 applied; for it was not a bar to the prosecution. Nor was it a judgment in rem under S. 41. It did not relate to a matter of a public nature as required by S. 42. Nor was its existence a fact in issue in the prosecution or relevant under any other section of the Act: S. 43. Heaton, J., put his decision on a quite different ground—the ground of public policy. "We cannot," he said

"have criminal Courts trying over again matters which have been thoroughly dealt with and finally decided by a civil Court of competent jurisdiction."

It is not easy to see how such a rule is to be enforced, unless the judgment of the civil Court is, in law, a bar to or conclusive against the prosecution. And what of cases in which the criminal Court has decided the controversy first and convicted? Can we not have the civil Court trying over again a matter which has been decided by a Court of competent jurisdiction and coming to a different conclusion? The truth is that, although the civil suit

(1) [1917] 41 Bom. 1=17 Cr. L. J. 153=33 I. C. 633.

and the prosecution may be based on exactly the same cause of action, the parties are, strictly speaking, not the same, the burden of proof is differently placed and different considerations may come in. The result may therefore be a conflict in decision. For instance, *A* is tried for murdering *B*, but acquitted, because a confessional statement by him is, in a criminal trial, inadmissible in evidence. *C*, *B*'s widow, sues him for damages for the murder and gets a decree, the confessional statement being admissible in a civil suit. In the matter of defamation, again, there is a good deal of difference between a suit for damages and a criminal prosecution. The prosecution is governed by the provisions of the Indian Penal Code, the suit by the English law of slander and libel. A defence which is open to the accused in the prosecution is not open to him as the defendant in the suit. The question of special damage may arise in the suit, but cannot arise in the prosecution.

It has often been said in this Court that, where a civil suit and a criminal complaint have been filed, which raise the same issues between the same parties, the hearing of the complaint should be stayed until the suit has been decided. And this has been put on the ground that it will avoid a possible conflict in decision. Our brother Jackson has pointed out in a judgment, in which we entirely concur, *Gnan-sigamani Nadar v. Vedamuthu Nadar* (2), that the risk of such a conflict is one that is inherent in the division of causes into criminal and civil. The judgment of neither is binding on the other and each must decide the cause on the evidence before it. If they arrive at different conclusions, it is regrettable, but unavoidable. The ruling *In re Marker* (1) was relied on in another case in this Court, *In re P. S. Velayutham Chetty* (3). The head-note states that the Bombay ruling was followed. The fact however remains that Krishnan, J., disposed of the criminal revision petition on the merits and not on the decision in the civil proceeding. What he said was that, if he accepted the civil judgment as the basis of his judgment in the criminal case, he would have to find that the conviction was wrong. What he refrained from saying was that it could be accepted as the basis

of his judgment. The head-note therefore seems to be inaccurate. If he had been satisfied that the Bombay ruling was unimpeachably correct he could and would have allowed the revision petition without considering the evidence in the criminal case.

It is not, we think, necessary to refer to any other rulings. We are satisfied that the judgment relied on by the Sessions Judge was not admissible in evidence under any of the relevant sections of the Evidence Act. It is a judgment in personam and not in rem, and is not conclusive proof, in the subsequent judicial proceeding, of anything material. The order of the Sessions Judge must be set aside. He will dispose of the criminal appeal on its merits.

P.R.S./P.N.

Order set aside.

* A. I. R. 1932 Madras 256

BEASLEY, C. J. AND CORNISH, J.

P. Krishnamachariar—Appellant.

v.

The Official Assignee of Madras—Respondent.

Original Side Appeal No. 70 of 1931, Decided on 24th November 1931, against decision of Stone, J., D/- 13th April 1931.

* **Legal Practitioner—Lien—Claim by advocate to Official Assignee for moneys due to him by insolvent for work done for him in probate proceeding in respect of will of which insolvent was executor and legatee—Claim can only be allowed against estate of insolvent—Advocate has no lien on property recovered by his exertions in absence of express agreement by his client to that effect—Insolvency.**

An advocate put in a claim to the Official Assignee for certain moneys due to him by the insolvent for work done for the insolvent in a probate proceeding in respect of a will of which the insolvent was the executor and a legatee and also for other work done by him on behalf of the insolvent, contending that he was entitled to payment from the estate of the testator on the ground that he had a lien on that property as having been recovered for the insolvent by his exertions in the probate litigation.

Held: that the insolvency Court could not make an order directing the Official Assignee to satisfy the claim out of the estate of the testator and that it could only be allowed against the estate of the insolvent.

Held further: that an advocate could not have a lien on the property in the absence of an express agreement to that effect by the client: *A. I. R. 1927 Bom. 542, Dist.* [P 257 C 1]

N. T. Shamanna—for Appellant.

S. G. Satagopa Mudaliar—for Respondent.

Cornish, J.—The appellant is an advocate of this Court. He put in a claim to

(2) A. I. R. 1927 Mad. 308=99 I. C. 853=28 Cr. L. J. 181.

(3) A. I. R. 1924 Mad. 516=72 I. C. 172=24 Cr. L. J. 332.

the Official Assignee for certain moneys due to him by the insolvent for work done for the insolvent in a probate proceedings in respect of a will of which the insolvent was the executor and a legatee, and also for other work done by him on behalf of the insolvent. The Official Assignee disallowed a portion of the claim as excessive. There was an appeal against that order, and Stone, J., held that the claim of the appellant should be allowed in full with interest against the estate of the insolvent. The appellant impeaches that order on the ground that he was entitled to payment from the estate of the testator, Appasami Pillai, inasmuch as he was entitled to a lien on that property as having been recovered for the insolvent by his exertions in the probate litigation.

With regard to the first part of this contention, it appears to us that it would not have been competent for the insolvency Court to make an order against the estate of the testator. The only property which was vested in the Official Assignee by reason of the executor's insolvency was the property of the insolvent. The insolvency of the executor did not have the effect of divesting him of Appaswami Pillai's estate which was vested in him as executor and of vesting it in the Official Assignee. The insolvency Court could not therefore have made an order directing the Official Assignee to satisfy the claim out of the estate of the testator.

With regard to the other point, I do not think that it is sustainable. There is no enactment in this country recognizing the particular lien for costs which is sanctioned by the Solicitors Act, 1860, in favour of a solicitor upon property recovered by his exertions for a client, though it has been held that solicitors who have been admitted attorneys of an Indian High Court have this lien: *Tyabji Dayabhai & Co. v. Jetha Devji & Co.* (1). But the appellant is an advocate and not a solicitor or attorney, and the only possible ground for supporting a claim to such a lien in his favour would be an express agreement by the client to that effect. But no such agreement is forthcoming. On the contrary it appears that the appellant took a promissory note for Rs. 3,000 as security for his costs in the probate litigation. There is therefore no ground for holding that appellant had a lien.

(1) A. I. R. 1927 Bom. 542=105 I. C. 383=51 Bom. 855.

Under these circumstances, the appeal fails and must be dismissed with costs.

Beasley, C. J.—I agree.

P.R.S./P.N.

Appeal dismissed.

*** * A. I. R. 1932 Madras 257**

JACKSON AND WALSH, JJ.

Gade Subbayya — Plaintiff—Appellant.

v.

Raja Kandukuri Venkata Hanumantha Bhaskara Rao Garu and another — Defendants—Respondents.

Appeal No. 197 of 1930, Decided on 23rd July 1931, against decree of Sub-Judge, Narsapur, D/- 22nd July 1929.

**** Hindu Law—Alienation—Widow—Interest on husband's debts is binding on estate and hence mortgage executed for principal and accumulated interest is valid in absence of fraud.**

A Hindu widow is bound if the income of her husband's estate admits of it to pay the interest payable on the binding debts as well as other necessary charges. But it does not necessarily follow that where the debt is a binding debt the interest payable upon that debt is not chargeable to the estate. The interest follows the principal and is recoverable from the estate if the principal amount is so recoverable. [P 259 C 1, 2]

Ordinarily a widow is expected to pay the interest on her husband's debts, and if that interest accumulates as a charge upon the estate the conduct both of the widow and of the creditor will require scrutiny. Where there is nothing in the conduct of either party to warrant a finding that they were committing fraud against the estate the mortgage executed for legal necessity by the widow which includes interest due on a prior mortgage similarly executed is binding on the reversioners: *A.I.R. 1914 Mad. 113, Ref.* [P 259 C 2]

S. Varadachariar and *K. Ramamurthi* —for Appellant.

Advocate-General and *V. Viyanna* —for Respondents.

Jackson, J. — Suit for recovery of Rs. 29,305-14-4 due on the mortgage deed Ex. A, dated 13th June 1911. The mortgage was executed by a widow, Kandukuri Raja Seshamma Garu in favour of defendant 2, while she was enjoying a life-interest in her husband's estate, and before she adopted defendant 1. Defendant 2 transferred the mortgage right to plaintiff under Ex. F. Seshamma Garu is dead and defendant 1 has become owner of the estate.

The transaction takes its origin from a compromise decree in this Court dated 8th January 1883, Ex. D, under which Seshamma Garu is bound to pay the mortgagee plaintiff Rs. 5,000, and interest at 10 annas per cent per mensem, for which a village stands hypothecated as security, and it is provided that if the

principal is not paid within five years the plaintiff shall take possession of the village, reckon its income at Rs. 500 and hold it till the debt is paid off.

Issue 1 is whether this decree is valid and binding on defendant 1. There is no reason to hold the contrary and that point is not now in dispute. In 1883, the estate was undoubtedly saddled with a binding debt under the terms of Ex. D.

In 1888, when the five years had expired the debt was not paid off, and Seshamma Garu was liable to surrender the village. Instead of doing so she executed a mortgage Ex. C agreeing to pay off the principal in five years, with interest at 11 annas per mensem, on arrears at Re. 1-4-0 per mensem and mortgaging the same village.

When these five years expired in 1903 another mortgage was executed, Ex. B, and it was arranged to pay off the debt in 14 instalments with interest at 9 annas 6 pies per cent per mensem and one rupee per cent per mensem for arrears. Finally in 1911 Seshamma Garu undertook under Ex. A to pay in 20 yearly instalments of Rs. 1,000 with interest at 12 annas per cent per mensem compound interest on arrears at one rupee per cent per mensem with annual rests. This is the suit document.

Issue 2 is whether Exs. C, B and A are true, valid and supported by consideration. There is not the least doubt that they are true and supported by consideration, and nothing which affects their validity is specifically in issue. In para. 7 of his statement defendant 1 alleges, but does not specify fraud; in para. 8 he denies the right of his adoptive mother to make any contract varying the terms of Ex. D; and in para. 10 he alleges that Ex. D was the most favourable of all the arrangements. If something on these lines had been put in issue it would be easier to understand what exactly is the defence.

The learned Subordinate Judge finds that Ex. C is true, but as regards its validity holds that its execution was a very improper and an imprudent act. He refused to admit evidence of the income of the mortgaged village. The refusal comes at the evidence of D. W. 2 in the record, but the plaintiff avers (affidavit of 30th September 1930), and it is not disputed, that he refused to take it when plaintiff led his evidence. It is difficult

to see how without knowing the income the learned Judge could stigmatize the act as imprudent. If the income is Rs. 10,000 it is obviously prudent to keep possession of the village. The respondent has now filed an affidavit putting the income in 1885 at Rs. 1,300 and in 1894 at Rs. 1,391, and Rs. 1,493 in 1903. If under Ex. D the mortgagee, as he would by defendant's reckoning took possession of the village till 1907, or for about 20 years he would receive an ostensible income of Rs. 10,000, and an actual income of about Rs. 26,000. No doubt by 1907 the defendant would have been paid off, but at an exorbitant cost. Under Ex. C the debt would have been cleared by 1893 at half the cost. We are unable to follow the lower Court's reasoning in para. 5, and we hold that Ex. C is valid and binding upon the estate. The subsequent modifications in Ex. B and Ex. A are mere matters of degree. The variations are not large enough to warrant an assumption that the widow was acting with imprudence or the mortgagee with dishonesty, especially as no special imputation is made; and no evidence is led as to the state of the market.

In Ex. B the interest is 9 annas 6 pies per mensem, time is given from 1903 to 1917, and the interest on arrears is 1 rupee per mensem. In Ex. C the interest is 11 annas per mensem, and on arrears 1 rupee and 4 annas per mensem. So B is not more onerous than C.

In Ex. A the interest is 12 annas, the time runs from 1911 to 1931, and the interest in default is one rupee per mensem compound interest. By the time that Ex. A came to be executed the payments under Ex. B had fallen into arrear and interest was payable on Rs. 12,000 lapsed instalments at 12 per cent. Under Ex. A, so long as there were no further arrears the interest would be 9 per cent. It is admitted that Rs. 20,000 in Ex. A is a round figure rather favourable to the debtor.

The time under Ex. B would expire in 1917 and defendant 2 as P. W. 1 says that he was threatening that he would sue them and give no further extensions unless he were given a higher rate of interest. So under Ex. A it was agreed to pay 12 annas as against 9½ annas per mensem in consideration of an extension of time for payment up to 1931.

Defendant 2 admits that he demanded a fresh document as a condition of advancing a loan to Seshamma Garu's brother-in-law. This is relied upon as suggesting a sinister origin for Ex. A but the very frankness of the admission disarms suspicion, and there is no ground for supposing that the widow, her brother-in-law, and the mortgagee, were conspiring against the interest of the estate. Not only did the widow pay Rs. 20,000 towards the principal and interest of the debt, but a large portion of the repayment came out of the brother-in-law's estate: see endorsements on Ex. A, pp. 47—50 documents. So the widow can hardly be said to have evaded her obligations to pay interest. Nor can the mortgagee be said to have connived at any such evasion. In Ex. A for the first time compound interest is leviable upon arrears, and if a creditor chooses to give a widow debtor this sharp reminder that she ought not to fall into arrear with her interest, the Courts can hardly object that he is acting legally. Whether as a matter of equity they will enforce the penal clause is another question.

We find therefore that even were the point in direct issue there is nothing in the facts of this case to warrant any finding of fraud or collusion.

The respondent relies rather upon a bare proposition of law that a widow cannot alienate the property of the estate in which she holds a life interest for payment of interest on a debt binding the estate. In Sarkar's Hindu law, Edn. 5, p. 625 it is stated thus:

"An alienation of husband's estate for the payment of husband's debts will not be binding on the estate unless it could not have been paid out of the current income."

This purports to be based on a Madras case reported in *Sakhi Reddy v. Venkanna* (1). In that case a distinction was drawn between the principal debt and the interest payable thereon; but the Court upheld the alienation because it was not proved that the widow had sufficient income to pay the interest or that the alienee had acted mala fide.

In an unreported case A. S. No. 113 of 1918 the law is laid down as follows:

"The widow is bound if the income of her husband's estate admits of it to pay the interest payable on the binding debts as well as other necessary charges. But it does not necessarily follow that where the debt is a binding debt the interest payable upon that debt is not chargeable

to the estate. In fact a proposition like that is prima facie untenable. The interest follows the principal and is recoverable from the estate if the principal amount is so recoverable. I (Abdur Rahim, J.), do not think that any contrary proposition is laid down in *Sakhi Reddy v. Venkanna* (1) Tyabji and Spencer, JJ., simply stated the proposition which is not disputed that it is the duty of the widow to pay out of the income the interest due on her husband's debts."

With which Spencer, J., concurs.

The question is really one of fact. Ordinarily a widow is expected to pay the interest on her husband's debts, and if that interest accumulates as a charge upon the estate the conduct both of the widow and of the creditor will require scrutiny. In this case, as already observed, there is nothing in the conduct of either party to warrant a finding that they were committing fraud against the estate. The estate was heavily involved under Ex D. By Ex. C the widow considerably lightened the burden. If she had died on 28th March 1888, the date of Ex. C there can be no question as to which document, Ex. D or Ex. C, the reversioner would have preferred to find when he entered upon his property.

In *Boddu Jagayya v. Goli Appala Raju* (2) it is asked:

"Was the widow entitled to allow the debt to accumulate and to make the interest a burden on the estate so as to bind the reversioners?"

And the ruling proceeds:

"A purchaser however will not necessarily be affected by the fact that the widow could have discharged the interest by means of her own income If he bona fide believed the sale was necessary he must be protected."

At the stage of Ex. C the widow was reducing not adding to the burden on the estate, and the mortgagee was acting bona fide. In *Gauri Shankar v. Kamala Prasad*, A. I. R. 1926 All. 645, Ashworth, J., holds that the creditor is responsible for mismanagement in which he connives in advance; which is merely to state that he will be unsuited on proof of fraud.

Then, as already pointed out, if Ex. C is valid and binding, its subsequent modifications by Ex. B and Ex. A are unexceptionable, and may be said to be merely in the course of business. We see no reason not to uphold these transactions, except that we think defendant 1 may be relieved against the penal provision of compound interest. Interest will be reckoned under Ex. A at 9 per cent on instalments not due on date of suit otherwise on the overdue instalments and interest thereon

(1) A. I. R. 1914 Mad. 113=24 I. C. 534.

(2) [1913] 18 I. C. 953.

12 per cent simple, per annum. Otherwise plaintiff is entitled to a decree as prayed for with costs throughout.

The appeal in the main is allowed.

The appeal having been set down to be spoken to on Tuesday, 18th October 1931, upon perusing the judgment and the proposed draft decree in the appeal and the objections to the draft decree and upon hearing the arguments of Mr. K. Ramamurthi advocate for the appellant and of Mr. V. Viyanna, advocate for respondent 1 and respondent 2 not appearing in person or by pleaders and the appeal having stood over for consideration till Thursday, 22nd October 1931, and Civil Miscellaneous Petition No 4980 of 1931 filed on behalf of respondent 1 in the appeal praying to pass an order as to costs in Appeal No. 197 of 1930 directing parties to pay and receive proportionate costs, coming on for hearing on the said Thursday, 22nd October 1931, upon perusing the figures worked out and arrived at by the office on the directions given by the Court, and the said petition and upon hearing the arguments of Mr. V. Viyanna, advocate for the Petitioner, and of Mr. K. Ramamurthi, advocate for the respondent in the petition, the Court made the following

Order.—The office method of working it out for each year with counter-interest is the meaning of the judgment which does not allow of compound interest and the figures thus arrived at by the office are accepted. The parties will pay and receive proportionate costs.

P.R.S./K.N.

Order accordingly.

A. I. R. 1932 Madras 260

PANDALAI, J.

Muthukumara Pillai — Defendant—Petitioner.

v.

Thirunarayana Pillai and another — Plaintiffs—Opposite Parties.

Civil Revn. Petn. No. 1746 of 1930, Decided on 28th April 1931, against order of Dist. Munsif, Chidambaram, D/- 17th September 1930.

(a) Civil P. C. (1908), S. 150—S. 150 is wide enough to authorize Court to which area is transferred to entertain in first instance any application which might have been made to Court passing decree.

Section 150 is intended to apply not merely to cases where there is a judicial transfer of specific business, but is in terms wide enough to authorize the Court to which the area has been transferred (including a fortiori the business not directly depending on territorial jurisdiction) to

entertain in the first instance any application which might have been made to the Court which passed the decree. [P 262 C 2]

Where therefore a suit for money is transferred from the Court where it is instituted to another Court beyond that jurisdiction, and a decree is obtained in that Court and then the second Court is abolished and the whole business of that Court is sent by administrative order to a third Court, the third Court has jurisdiction to entertain a petition for sending the decree for execution to the first Court and the petition for execution need not be presented in the first instance to the first Court: 42 *Mad.* 821, *A. I. R.* 1922 *Mad.* 10 and 1923 *Mad.* 92, *Rel. on.* [P 263 C 1]

(b) Civil P. C. (1908), Ss. 37 and 150—S. 37 does not deprive the decree-holder of facility under S. 150.

Section 37 is an inclusive definition and must not be used so as to deprive the decree-holder of the facility provided by S. 150: 42 *Mad.* 821, *Foll.* [P 262 C 2]

A. V. Viswanatha Sastri and *S. Jagadisa Aiyar*—for Petitioner.

M. Patanjali Sastri—for Opposite Parties.

Judgment.—This petition raises an interesting and uncommon question. When a suit for money is transferred from the Court where it is instituted to another Court beyond that jurisdiction and a decree is obtained in that Court and then the second Court is abolished and the whole business of that Court is sent by administrative order to a third Court, has that (third) Court, jurisdiction to entertain a petition for sending the decree for execution to the first Court or must the petition for execution be presented in the first instance to the first Court?

The facts are as follows: The suit, O.S. No. 179 of 1922, which was for money on a promissory note, was filed in the Vriddachalam Munsif's Court by two minor plaintiffs represented by their mother as next friend and was transferred for disposal to the Mannargudi Munsif's Court and there numbered as O. S. No. 633 of 1923, and a decree was passed against the petitioner-defendant. Subsequent to the decree the Munsif's Court of Mannargudi was abolished and its territorial jurisdiction and business were added to that of the Chidambaram Munsif's Court. After plaintiff 1 became a major after decree, he and his mother quarrelled and separate petitions for execution, one by plaintiff 1 for himself and purporting to act as a next friend of plaintiff 2 and another by his mother as next friend of plaintiff 2 were filed in the Chidambaram Court. In the course of these disputes as to who was entitled to execute the decree, plain-

tiff 1 stated that the whole decree was discharged by payment to himself. This was disbelieved by the Court as collusive and plaintiff 1 was removed from the office of next friend of plaintiff 2 and the mother appointed instead. At this stage the judgment-debtor raised the objection that the Chidambaram Court had no jurisdiction to entertain the mother's petition which was to transmit the decree for execution to the Vriddhachalam Court. The objection was based on the ground that the Mannargudi Munsif's Court having been abolished and ceased to exist, the only Court which could execute the decree is, according to S. 37 (b), Civil P. C., the Court where the suit would have to be brought if the suit were brought at the date of the application which is admittedly the Vriddhachalam Court as the defendant lives and the cause of action arose in that jurisdiction. The objection was overruled by the District Munsif on the ground, as I understand it, that S. 37 (b) is not applicable to the case and that the Chidambaram Court having succeeded to the business of the Mannargudi Court, the former Court is entitled under S. 150 to do what the Mannargudi Court, if not abolished, might have done, i. e. to transmit the decree for execution and decide all things necessary to be decided before it is transmitted.

Sections 37, 38 and 150, Civil P. C., on which this question depends, have been the occasion of so many decisions that it is curious that the learned advocates have not been able to bring to my notice any case like the present where the suit or the decree is one for a simple money debt without the security of immovable property. The questions which have hitherto been the subject of decision arise where after suit and before execution, the territorial jurisdiction over the immovable property concerned has been changed either because the trial Court being abolished its territorial jurisdiction has been merged in other Courts, or because such Court being still in existence its territorial jurisdiction over the property has been wholly or partially conferred on other Courts. In such cases it is now held that where the trial Court still exists, it has jurisdiction at least to entertain applications for transmitting the decree to the Court to which jurisdiction over the property con-

cerned has been transferred. In *Satrucherla Sivaskanda Raju v. Raja of Jey-pore* (1), the decision of the Full Bench in *Seeni Nandan v. Muthuswami Pillai* (2), was construed as recognizing the powers of the trial Court only to the extent of receiving and transmitting execution applications to the proper Court; and it was held that *Subbiah Naicker v. Ramanathan Chettiar* (3) still remains good law except to the extent it was modified by the Full Bench decision. But this limitation in the effect of the Full Bench decision was dissented from in *Subramania Aiyar v. Swaminatha Chettiar* (4) where the authorities were re-examined at great length and it was held that where the trial Court still exists it alone has the power to execute a mortgage decree passed by it even where all the property covered by the mortgage has been subsequently withdrawn from its jurisdiction and that S. 150 has not the effect of conferring jurisdiction to execute such decrees on the Courts to which territorial jurisdiction is transferred unless the execution proceedings are by judicial order transferred thereto. The conflict between the decisions of these two Benches on the effect of the Full Bench decision on the powers of the trial Court which has passed a mortgage decree to execute that decree after the property has been withdrawn from its jurisdiction is fundamental and can be settled only by a Full Bench. That question does not arise in this case.

There are two matters which distinguish the present case from those above referred to and the cases cited therein. First, the present is a case where the trial Court has ceased to exist, and not a case where though it exists it has ceased to have jurisdiction to execute the decree which is an idea exclusively applicable to transfers of territorial jurisdiction. *Venkatasami Naik v. Sivanu Mudali* (5). Second, the decree in question is a simple money decree, the power to execute which is not affected by any subsequent changes in the territorial jurisdiction of the Court which heard the case. It cannot be supposed that if the Mannargudi Munsif's Court was still in existence, it

(1) A. I. R. 1927 Mad. 627=103 I. C. 245=50 Mad. 882.

(2) [1919] 42 Mad. 821=53 I. C. 213 (F. B.).

(3) A. I. R. 1914 Mad. 162=37 Mad. 462.

(4) A. I. R. 1928 Mad 746=114 I. C. 545.

(5) [1918] 42 Mad. 461=51 I. C. 102.

would not have power to execute the decree though the suit was transferred to it from Vriddachalam where alone it could have been properly instituted. Such power could be exercised either by arresting the judgment-debtor if found within its jurisdiction or by seizing any property of his in that jurisdiction or by sending it for execution to any other Court including that of Vriddachalam.

The question for decision is whether the Mannargudi Court having been abolished, and both its territorial jurisdiction and business before it transferred not by judicial order under the Civil Procedure Code but by arrangements made by Government acting under the Civil Courts Act, to the Chidambaram Munsif's Court, the latter Court can entertain an application to transmit the decree for execution to another (Vriddachalam) Court which would be possible if S. 150 applied or whether in the facts mentioned the application should be made only to the Court which would have jurisdiction to try the suit if it was instituted at the time of the application.

If it were not for the observations in *Subramania Aiyar v. Swaminatha Chettiar* (4) to the effect that S. 150 refers to cases where certain specified business has been actually transferred by the order of a competent Court and do not apply to any other case (per Ramesam, J., at pp. 891, 892 and 893 and per Devadoss, J., at pp. 905, 906) this case would present no difficulty. But they were made with reference to a case relating to immovable property in which the Court which passed the decree was still in existence and the question for decision was whether in such a case that Court had lost its jurisdiction to execute its own decree and whether S. 150 conferred the jurisdiction in execution to the Court to which the territorial jurisdiction was transferred. The learned Judge's observations cannot be understood as intended to apply to simple money decrees passed by Courts which had ceased to exist and from which therefore no transfer by judicial transfer under S. 24 is possible. It is easy to show what inconveniences and anomalies would result from applying these observations to simple money decrees of abolished Courts the territorial jurisdiction and business of which has been, by order of Government under the Civil Courts Act, trans-

ferred to another, probably, neighbouring Court as in this case. A suit for money may be brought in a Court within whose territorial jurisdiction either the cause of action arose or the defendant resides. If a promissory note was executed at Benares, and the executant lived at Mannargudi when the suit was brought, but after decree the defendant left Mannargudi and went away to Nagpur and the Mannargudi Court is abolished and its business is transferred to Chidambaram, is the decree-holder to be compelled to apply for execution to the Court at Benares or Nagpur where he would have to sue if he were suing for the first time; and is he not entitled to apply to the Chidambaram Court to attach some property of the defendant that may be left at Mannargudi or to send the decree for execution to some other Court in this Presidency where such property may be found? I think their Lordships scarcely intended such consequences to follow from their remarks as to S. 150. On the contrary there are weighty observations by the learned Chief Justice and other learned Judges in the Full Bench case *Seeni Nandan v. Muthuswami Pillai* (2), and by the learned Judge in *Ranganatha Rao v. Hanumantha Rao* (6) and *Guruswami Naicker v. Mahomadhu Rowther* (7), to the effect that S. 150 was intended to apply not merely to cases where there was a judicial transfer of specific business but that the section was in terms wide enough to authorize the Court to which the area had been transferred (including a fortiori the business not directly depending on territorial jurisdiction) to entertain in the first instance any application which might have been made to the Court which passed the decree. It seems to me on the best consideration I can give that, in cases like the present, that is the sound principle of construction of S. 150 and I must follow them. As pointed out by the Chief Justice in *Seeni Nandan v. Muthuswami Pillai* (2), S. 37 is an inclusive definition and must not be used so as to deprive the decree-holder of the facility provided by S. 150.

I therefore think that the respondents' application to transmit the decree was

(6) A. I. R. 1922 Mad. 10=65 I. C. 727=46 Mad. 1.

(7) A. I. R. 1923 Mad. 92=86 I. C. 650=46 Mad. 83.

properly made to the Chidambaram Munsif's Court and dismiss this petition with costs.

P.R.S./R.M. *Petition dismissed.*

A. I. R. 1932 Madras 263

SUNDARAM CHETTY, J.

(Dasari) Venkatacharyulu—Petitioner.
v.

Manchala Yesobu and another—Opposite Parties.

Civil Revn. Petns. Nos. 1588 and 1589 of 1930, Decided on 8th April 1931, against order of Dist. Munsif, Gudivada, D/- 4th March 1930.

Civil P. C. (1908), S. 151—Application by plaintiff for appointment of receiver in respect of standing crops—Defendant asked to furnish security and receiver not appointed—Failure by defendant to furnish security or deposit amount in spite of order of Court—Court held had jurisdiction under S. 151 to strike off defence of defendant.

On an application by the plaintiff or the appointment of a receiver in respect of the standing crops in the suit land, the defendant was ordered by the Court to furnish security for Rs. 100. No receiver was actually appointed, but the defendant although he put in a security bond, the sufficiency of which was ordered by the Court to be tested, did not pay the batta for the issue of the process to the Court amin who was to look into the adequacy of the bond. The Court thereupon ordered the defendant to deposit the amount in Court warning the defendant that on failure to do so his defence would be struck off. The defendant failed to make the deposit and consequently his defence was struck off.

Held: that the striking off of the defence was within the jurisdiction of the Court in the exercise of its inherent powers under S. 151 although it was not the only order which the Court could pass under the circumstances of the case: *A. I. R. 1924 All. 17* and *A. I. R. 1925 All. 280, Rel. on.* [P 264 C 1]

Ch. Raghava Rao—for Petitioner.

Judgment.—These revision petitions raise a somewhat novel point for determination. The petitioner is defendant 3 in the suit. It appears that the plaintiffs applied for the appointment of a receiver in respect of some standing crops in the suit land. In connexion with that application the Court passed an order directing defendant 3 to furnish security for Rs. 100. On his furnishing such security he could appropriate the crops. No receiver was actually appointed. That being so, it was the duty of defendant 3 to furnish the required security which alone would entitle him to cut and carry away the crops. In pursuance of the order of the Court he put in a security bond into Court. The Court passed an order on 6th December 1929, to have the suffi-

ciency of the security tested. Usually a warrant will be issued to an amin of the Court to make an investigation as to the adequacy of the security offered. For this purpose batta had to be paid for the issue of a process. There is no doubt that the person bound to pay the batta was defendant 3, inasmuch as it was his duty to furnish the security to the satisfaction of the Court. Unless the security tendered by him is accepted by the Court it will be of no avail. It was not therefore the duty of the plaintiffs to have paid the batta for the testing of the security tendered by defendant 3. Default in the payment of the batta was doubtless on the part of defendant 3. The security tendered by him not having been tested, the Court was not in a position to accept it. In these circumstances the learned District Munsif treated the case as one of non-compliance with the order of the Court directing security to be furnished and therefore passed an order directing defendant 3 to deposit into Court a sum of Rs. 100 within 15 days. A warning was also given at the same time that, if such deposit be not made, his defence would be struck off. In spite of this stringent order, defendant 3 failed to make the deposit and consequently his defence was struck off by the Court on 4th March 1930. Against these orders defendant 3 has filed the revision petitions.

There is no express provision in the Code of Civil Procedure which would cover a case of this kind. R. 21, O. 21, Civil P. C., enables the Court to strike off the defence if default is made in the manner mentioned in that rule. R. 16, O. 6, R. 20, O. 16, and R. 10, O. 8, contain some provisions for punishing a party for default in a particular manner. The present case can only be brought under S. 151 of the Code which deals with the inherent power of the Court to pass such orders as may be necessary in the ends of justice, or to prevent the abuse of the process of Court. In this case defendant 3 not only made default in the payment of batta, but failed to obey the further order of the Court directing him to deposit the sum of Rs. 100, he having failed to furnish the required security. Without fulfilling that condition he had no right to cut and carry away the crops. There was justification for the Court to treat the conduct of defendant 3 as something

amounting to a contempt of Court. Any penalty which the Court thinks fit to impose on defendant 3 for such wilful default or disobedience should be deemed to be a step taken by the Court in the exercise of the inherent powers vested in it by S. 151, Civil P. C. The decisions in *Gauri Shankar v. Mt. Manki Kunwar* (1) and *E. I. Ry. Co. v. Jit Mal Kallu Mal* (2) are cases which have a bearing on the present case by way of analogy. The striking off of the defence of defendant 3 in this case would be within the jurisdiction of the Court in the exercise of its inherent powers under S. 151. There is no case directly applicable to the facts of the present case, but still it seems to me that the order passed by the lower Court in the circumstances of this case is not without justification and therefore I see no proper grounds to interfere with it in revision. I may also observe that the striking off of the defence is not the only order which the Court can pass by reason of defendant 3's default or disobedience. All that I can say is that this is one of the orders which the Court would be entitled to make in order to see that the ends of justice are satisfied or that the process of the Court is not abused. These civil revision petitions are therefore dismissed.

P.R.S./R.M. *Petitions dismissed.*

(1) A. I. R. 1924 All. 17=74 I. C. 466=45 All. 624.

(2) A. I. R. 1925 All. 280=86 I. C. 862=47 All. 538.

* A. I. R. 1932 Madras 264

RAMESAM, OFFG. C. J. AND CORNISH, J.
S. R. M. Ramaswami Chettiar and
others—Appellants.

v.

The Official Assignee of Madras—Respondent.

Original Side Appeals Nos. 13 and 67 of 1931, Decided on 1st September 1931, against order of Waller, J., D/- 18th February 1931.

* Presidency Towns Insolvency Act (1909), S. 126—One Court in British India can send letter of request to another Court in British India.

Section 122, Bankruptcy Act, 1914 applies to all insolvency Courts in British Empire and it not only authorizes one Court in the United Kingdom to aid and get aid from British Courts outside the United Kingdom but also enables two British Courts outside the United Kingdom to aid each other. Therefore it authorises one High Court in British India, to aid another High Court in British India, or a High Court in British India

to help a Provincial Insolvency Court in British India. [P 266 C 1]

Where the subsequent order and letter of request of the High Court makes clear what was intended by the first letter of request and also that the order as originally issued was a valid order, the Court to which the request is made must be regarded as having had jurisdiction from the receipt of the first letter of request to give directions to the Official Assignee to act in aid. [P 266 C 2]

T. M. Krishnaswamy Ayyar—for Appellants.

M. Subbaraya Ayyar—for Respondent.

Ramesam, Offg. C. J.—The facts out of which these appeals arise may be thus stated. A Nattukottai Chetty firm, viz., T. S. N. Firm, was adjudicated insolvent by the Rangoon High Court on 10th March 1930. On 15th July the Official Assignee of Rangoon applied to that Court that a letter of request be issued to the High Court, Madras, directing the Official Assignee of Madras to act in aid of the High Court of Rangoon in the matter of the insolvency of this firm. This was ordered by the Registrar of the Rangoon High Court on the same day. The order runs thus; "Write letter as usual for such request." The Official Assignee of Madras applied to this Court for an order directing him to act in aid of the Official Assignee of Rangoon in pursuance of the above letter of request and obtained such an order from our brother Waller, J., on 19th January 1931. But this order was passed ex parte, i. e., without notice to the insolvents. The Official Assignee of Madras then took out a notice of motion on 28th January praying for further direction to the insolvents in respect of filing schedules, delivering properties and executing documents in respect of certain other properties. Waller, J., passed an order on 18th February 1931. In the statement filed by the insolvents in reply to the notice of motion objection was taken to the jurisdiction of this Court. In para. 4 it was contended that the alleged letter of request is ineffective and inoperative and cannot confer any jurisdiction on this Court or on the Official Assignee of Madras as it does not deal with any particular matter and the same is not in conformity with law. In para. 5 it is alleged that the High Court of Rangoon cannot hand over business within its jurisdiction which can properly be dealt with by that Court to another Court.

When the matter came on for argument before Waller, J., the objection to jurisdiction seems to have been pressed in a somewhat slightly different form, viz., that no copy of the order required by S. 122, English Bankruptcy Act, has been produced; But Waller, J., observed:

"I infer from the terms of the letter of request that such an order was passed."

He further observed that there is a presumption that official acts have been properly performed. He also referred to *In re Firbank* (1) to show that the Registrar could pass such orders without reference to the Judge. Finally he held that he had jurisdiction and passed an order directing the insolvents: (1) to deliver to the Official Assignee all their moveable properties in Pudukottah State; (2) to execute in his favour transfers of their immovable properties in that State; (3) to deliver possession to him of their properties; and (4) to file their schedules in two weeks. He observed that in default warrants will be issued and the insolvents will be committed for contempt. O. S. A. No. 13 is against this order.

Later on, the matter came on for further hearing before our brother Stone, J., in April last. Objection to jurisdiction was then taken in a new form. It was contended that as the letter of request did not deal with any specific matter, this Court had no jurisdiction. Stone, J., seems to have thought that there was something in this but he did not express any opinion on that date. The Official Assignee intimated that he would get a clearer letter of request and would produce the order of the Rangoon High Court. On his communication with the Official Assignee of Rangoon a formal order (in the nature of a decree) was drafted on 22nd April 1931, the original order of 15th July 1930 being in the nature of a judgment. The order of 22nd April directs the issue of a letter of request to the High Court of Madras and its officers to act in aid of the Rangoon High Court in realizing, reducing to possession, managing, selling, bringing, defending suits applications, etc., and otherwise dealing with the moveable and immovable assets of the insolvent firm and its partners in the District Court of South Arcot, Tanjore and elsewhere in the Presidency of Madras, etc. This order also declares that the order of the Registrar dated 15th July 1930 and the letter of request dated

17th July 1930 were in accordance with the practice of the Rangoon High Court that the formalities prescribed by law were followed and that the intention of the order and the letter of request was to empower the Official Assignee of Madras to do everything that was necessary in regard to the properties of the insolvents. When this order was produced before Stone, J., he passed an order on 28th April. In that order he observed that the first letter of request received from the Rangoon High Court was useless and did not confer any jurisdiction on him. Any jurisdiction he could have related to matters directed by the order of that Court and that order to be effective must be an order directing something specific to be done. He was of opinion that it did not refer to anything specific to be done except that it merely referred to a letter of request. He therefore ordered that the Official Assignee should pay the taxed costs of the application to the insolvents. He further held that the order since received was an effective order. At this stage it may be observed that there was no new order passed by the Registrar of the Rangoon High Court after 22nd April 1931. The order directing the issue of the second letter of request is still the same old order, namely, that which was passed on 15th July 1930. The difference was only in the formal order (corresponding to a decree) that was drawn up in pursuance of that order. It does not appear that any formal order was drawn up in the beginning but now a formal order dated 22nd April 1931 has been drawn up which explains the intention of the order of 15th July 1930. O. S. A. No. 67 of 1931 is against this last order of Stone, J.

Now, coming to the merits of these appeals the first point argued by the learned advocate for the appellant, Mr. T. M. Krishnaswami Ayyar, is that under S. 126, Presidency Towns Insolvency Act, one Court in British India cannot send a letter of request to another Court in British India. Now S. 126 provides that all Courts having jurisdiction under this Act shall make such orders and do such things as may be necessary to give effect to S. 118, Bankruptcy Act, 1883. S. 118, Bankruptcy Act, 1883 is the same as S. 74, Bankruptcy Act, 1869 and S. 122, Bankruptcy Act, 1914. Under these Acts not only the Bankruptcy Courts in

the United Kingdom but also every British Court elsewhere having jurisdiction in bankruptcy or insolvency and the officers of those Courts respectively, shall severally act in aid of and be auxiliary to each other. We are of opinion that S. 122 applies to all the insolvency Courts in the British Empire and that it not only authorizes one Court in the United Kingdom to aid and get aid from British Courts outside the United Kingdom but also enables two British Courts outside the United Kingdom to aid each other. Therefore it authorizes one High Court in British India to aid another High Court in British India, or a High Court in British India to help a Provincial Insolvency Court in British India. And because its main object was this; that S. 126 has been enacted in the Presidency Towns Insolvency Act directing all Courts having jurisdiction under the Act to make such orders and do such things as may be necessary to give effect to S. 118, Bankruptcy Act, 1883, and also S. 77, Provincial Insolvency Act. We therefore overrule this contention.

The next point argued before us is that even if according to the second letter of request this Court has jurisdiction that jurisdiction begins only from 28th April 1931, when the said letter of request was produced, that all acts done prior to that date were done without jurisdiction and that therefore the order of Waller, J., was null and void. It is also contended that all interim orders must be regarded as invalid. Now when we remember that only one order was passed by the Registrar, namely, the one dated 15th July 1930, and that the first letter of request and the second letter of request were issued in pursuance of that order it is clear that the proper view to take of the first letter of request is that it was somewhat ineffective to inform this High Court of the intentions of the Rangoon High Court. It is perhaps permissible for a Judge here to hold that it was not enough to confer jurisdiction. When the only objection that was pressed before Waller, J., was that the main order itself was not produced, the learned Judge inferred that there must have been such an order. We now know that his inference was right. As a matter of fact there was an order and seeing that this was the only objection pressed before him, his order was perfectly right. When

the objection was repeated in a different form before Stone, J., perhaps there was a reasonable doubt as to whether this Court had jurisdiction on 13th April. But when the formal order of 22nd April 1931, based on the order of 15th July 1930 was produced on 28th April 1931 before Stone, J., all grounds for doubting the jurisdiction of this Court disappeared.

We do not think that there is any substance in the objection that either the order or the letter of request should refer to specific matters. All that S. 122, Bankruptcy Act, 1914, says is that an order of the Court seeking aid with a request to another Court shall be deemed sufficient to enable the latter Court to exercise "in regard to the matters directed by the order such jurisdiction etc." This shows that there must be some matters directed by the order. Now, the judgment of 15th July did not specifically refer to any matter but it has now been made clear to us by the formal order of 22nd April 1931 that the practice of the Rangoon High Court was to pass the order in that form and that it was always taken to mean that the letter of request should relate to realizing, reducing to possession, managing, selling, bringing defending suits, applications etc., in respect of the assets of the insolvents. When once the scope of the original order is made clear by the later order the requirements of S. 122, Bankruptcy Act, 1914, are satisfied because there is some matter referred to in the later order. Even in the first letter of request there is a reference to the "properties of the abovenamed insolvent firm." By a liberal construction it is possible to say that there was some matter directed in the order. However it is not necessary for us to say that the construction of Stone, J., put on the first letter of request is incorrect. When the later order was produced all doubts vanished and there was no question of any specific matter that should have been referred to in the letter of request or in the order. As the order of 22nd April 1931 and the letter of request rest upon the order passed on 15th July 1930, which as we now understand is a perfectly good order not only is the order of Waller, J., right but it must be held that this Court had jurisdiction from the very beginning though it must be said that the matter was cleared up only after the production

of the order of 22nd April 1931. In this view the final order of Stone, J., holding that this Court has jurisdiction is perfectly correct. It is unnecessary to say anything about the first part of the order as there is no appeal against it.

It is suggested that the order of Waller, J., will cause some inconvenience to the insolvents as they have since been adjudicated insolvents in the Pudukottah State and that they are unable to execute conveyances in respect of their immovable properties or to deliver possession. It is perhaps safe to delete that portion, i. e. items (b) and (c) of Waller, J.'s order directing the insolvents to execute transfers in respect of their immovable properties in favour of the Official Assignee and to deliver possession.

As regards the moveable properties, Waller, J., was perfectly right in passing the order. It is now said that some of the properties were destroyed in the recent riots and fire in the Pudukottah State. It is for the insolvents to prove to the satisfaction of the Court that the properties were so destroyed and therefore that there was no default on their part. If any complaint is made about the insolvent's conduct alleging default on their part, the matter must be made the subject of an inquiry and then only it can be found whether they are guilty of contempt so understood. The last part of Waller, J.'s order will be allowed to remain. It is also suggested that it is very inconvenient if the inquiry as to the Cuddalore properties is held in Madras we leave it to the discretion of the Judge either to refer the Official Assignee to the Cuddalore Court or, while retaining the matter in this Court, to issue a commission for examining the Cuddalore witnesses so as not to cause hardship to the insolvent.

The result is that both the appeals are dismissed with taxed costs.

Cornish, J.—I entirely agree and only wish to add a few words on the question of jurisdiction which has been argued. I think that S. 126, Presidency Towns Insolvency Act, enabled the Rangoon High Court to call upon the Madras High Court and its officers to act in aid of it and of the Official Assignee of Rangoon in this insolvency. S. 126 provides that all Courts having jurisdiction under the Act shall make such orders and do such things as may be necessary to give effect to

S. 122, Bankruptcy Act, 1914, which has replaced S. 118, Bankruptcy Act, 1883, referred to in S. 126. Now S. 122 says that the High Court, the County Court, the Courts having jurisdiction in bankruptcy in Scotland and Ireland, and every British Court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of those Courts respectively, shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy. I think the natural meaning of this provision is that not only is a British Court outside the United Kingdom to act in aid of a Court within the United Kingdom, but that it is to act in aid of another British Court elsewhere. To hold that the section only intends reciprocal aid between a Court in the United Kingdom and a British Court elsewhere would be in my opinion to put a wholly unreasonable construction on the words in the section. But in order to give the Courts whose aid is sought by another Court jurisdiction to act, S. 122 requires that there must be an order of the Court seeking such aid together with a request. There was both an order and a letter of request in this case. I think that Stone, J., was justified in his view, that the request as at first presented did not sufficiently show what were the matters directed by the order in respect of which the Madras Court was required to act in aid. But the subsequent order and letter of request of the Rangoon High Court made clear what was intended by the first letter of request, and also that the order as originally issued was a valid order. The second letter of request, in fact, merely implemented the first request; and as it was made in pursuance of a valid order, the Madras Court must be regarded as having had jurisdiction from the receipt of the first letter of request to give directions to the Official Assignee to act in aid.

P.R.S./K.N. *Appeals dismissed.*

A. I. R. 1932 Madras 267

RAMESAM, J.

Appasami Pillai—Defendant—Appellant.

v.

Ramu Tevar—Plaintiff—Respondent.

Second Appeal No. 1957 of 1927, Decided on 16th March 1931, against decree of Dist. Court, West Tanjore, in A. S. No. 88 of 1926.

(a) **Hindu Law—Alienation—Recital by deceased Hindu widow is admissible in evidence—Evidence Act (1872), S. 32.**

After the death of the last male owner, his widow executed in favour of her daughter in 1879 a deed of gift in which she recited the oral gift by herself and her husband to her daughter as stridhan at the time of her marriage and purported to execute a formal conveyance in pursuance of the directions of her husband.

Held: that the deed being more in the nature of an admission of a preceding gift rather than a case of a new alienation, the recital contained therein was admissible under S. 32 as the widow who had made it was dead at the date of the suit: *A. I. R. 1926 Pat. 255, Ref. (Case law distinguished)*. [P 269 C 1]

(b) **Hindu Law—Religious endowment—Valid trust—De facto manager can sue on behalf of the trust if suit is for benefit of trust.**

A de facto manager of a trust should be allowed to maintain a suit which is for the benefit of the trust in spite of some defect in his title as trustee and also of the fact whether he had prior possession or not. Once the finding that there is a trust is reached, it is the idol that is really entitled to the suit properties. Who exactly should be the trustee representing the idol is really a different matter. Any difficulty in deciding that question ought not to prejudice the rights of the idol: (*Case law referred*). [P 270 C 2]

N executed in 1899 a deed of settlement in respect of her stridhan under which she appointed her cousin K and his sons and grandsons and so on for generations to continue for ever to conduct certain charities after her lifetime. K showed no inclination to undertake the trust and died in 1914 during her lifetime.

Held: that as K had not accepted the trusteeship during N's lifetime though it was to take effect after N's death and as he did not survive N so as to have an opportunity of accepting the trust after her death, the trusteeship never vested in him at all and did not descend upon his heirs. The estate conferred by the settlement deed remained only a contingent estate and when he died there was nothing to be transmitted to his heirs, and consequently the appointment of the plaintiff in 1913 as a trustee to conduct the charities, even though he was appointed without waiting for K's refusal, was valid.

A. Krishnaswami Aiyar and R. Ramamurthi Aiyar—for Appellant.

S. Varadachariar for *A. V. Viswanatha Sastri*—for Respondent.

Judgment.—This second appeal arises out of a suit by one Ramu Tevar to recover certain properties of which he had been appointed trustee by their owner Nilambal Achi, who endowed them for puja and other purposes of Sri Sundaramurthi Swami. Nilambal Achi died on 28th May 1923. The plaintiff alleges that he was managing the properties on behalf of Nilambal Achi during her lifetime and continued to be in possession after her death. He leased them to defendant 3 on 9th June 1923. Defendants 1

and 2 prevented defendant 3 from obtaining possession. They claimed to be reversioners to the estate of Nilambal Achi's father Appa Pillai, after Nilambal Achi's death. But defendant 2 sold his share of the property to defendant 1 and has no further interest in this suit. Defendant 1 contended that on Appa Pillai's death his two widows, Thayyamuthu Achi and Kamalathachi, succeeded to his estate, that after their death the estate devolved upon their daughters, Nilambal Achi and Palanivelu Achi and after the death of Palanivelu Achi, Nilambal Achi became the sole owner and that on her death on 28th May 1923, defendants 1 and 2, the reversioners, became entitled to the property. The plaintiff meets this case by relying upon a gift of the suit property by Appa Pillai to Nilambal Achi at the time of her marriage. Both the lower Courts have decreed the plaintiff's suit. Defendant 1 appeals.

The first point therefore that arises in this second appeal is whether the gift to Nilambal Achi by Appa Pillai was true. One important evidence of this gift is Ex. M-2, which is a deed executed by Thayyamuthu Achi on 20th September 1879, in which she recites the gift by her husband and herself to Nilambal Achi as stridhanam at the time of the marriage and purports to execute a formal conveyance in pursuance of the oral directions of her husband. The learned Advocate-General who appears for the appellant contends that the recitals in Ex. M-2 are not admissible in evidence. He relies on the decisions in *Brij Lal v. Inda Kunwar* (1), *Hari Kishen Bhagat v. Kashi Pershad Singh* (2) and *Banga Chandra v. Jagat Kishore* (3). These are all decisions of the Privy Council and it is laid down in these cases that where a widow effects an alienation for alleged necessity, recitals of existence of such necessity in the document itself are not evidence of the existence of the necessity. In *Brij Lal v. Inda Kunwar* (1) at p. 193 (of 36 All.), it is laid down:

“Recitals in mortgages or deeds of sale with regard to the existence of necessity for the alienation have never been treated as evidence by themselves of the fact. And it has been repeatedly

(1) A. I. R. 1914 P. C. 38=23 I. C. 715=36 All. 187 (P.C.).

(2) A. I. R. 1914 P.C. 90=27 I. C. 674=42 I.A. 64=42 Cal. 876 (P.C.).

(3) A. I. R. 1916 P. C. 110=36 I. C. 420=43 I. A. 249=44 Cal. 186 (P.C.).

pointed out by this Board that to substantiate the allegation there must be some evidence aliunde."

The use of the words "by themselves" shows that the recitals are not inadmissible in evidence and the effect of the observations is merely that without other evidence they are not enough to prove the necessity. The judgment of the Privy Council makes no reference to S. 32, Evidence Act. From the report of the case in *Lala Brij Lal v. Inda Kunwar* (1), it appears that Sir E. Richards, K. C., the learned counsel for the appellant, relied on S. 32, Evidence Act, but none of the reports shows that there was any admission in the mortgage deed or sale-deed which would be strictly covered by S. 32, Evidence Act. In *Hari Kishen Bhagat v. Kashi Pershad Singh* (2) at p. 885 (of 42 Cal.) it is observed:

"To be valid as against the reversioners, or to affect their reversionary rights, a charge created by a Hindu widow or an alienation effected by her can be supported only by proof aliunde that such debt was contracted or such alienation was made for valid and legal necessity, etc."

No reference was made to S. 32, Evidence Act, either in the argument or in the judgment. It must be assumed that the recitals in the document concerned in that case were not covered by S. 32. The same remark applies to the decision in *Banga Chandra v. Jagat Kishore* (3) and to *Marimuthu Pillai v. Velu Pillai* (4). The decision in *R. Ramachandrayya v. B. Janakiramayya* (5) relates to an alienation by a guardian on behalf of a minor and does not help us in this case. But apart from all the above remarks the present case is not one of an alienation for necessity. Ex. M-2 is more in the nature of an admission of a preceding gift rather than a case of new alienation. I doubt if the principle of the above case applies to a case like the one before me. In my opinion the recitals in Ex. M-2 are admissible in evidence: vide also *Sita Ram Singh v. Khub Lal Singh* (6). There is also other evidence in the case from which a gift by Appa Pillai to his daughter can be inferred, for example, Ex. U seems to furnish strong evidence in support of the plaintiff's case. The main part of the document is simply the report of the Revenue Inspector. To the report a statement made before the Revenue Inspector by the present defen-

dant 1 is appended. Though this statement makes reference to the transfer by Nilambal Achi of her lands to Sri Sundaramurthi Swami, no dispute was raised as to her title to the lands or her capacity to grant them to the deity. The only claim made in that statement is that he was her heir after her death in respect of the trusteeship. It is open to the Court to infer from this document that he never meant to question her title. When it is remembered that Thayyamuthu Achi was the stepmother of Nilambal Achi and not her mother and thus there is no suspicion of collusion it is open to the Court to infer that the gift by Appa Pillai to Nilambal Achi was proved. I am therefore bound in second appeal to accept the finding of the Courts below in this case that the gift to Nilambal at the time of her marriage was true.

The next question that arises in the case is whether even then the plaintiff is entitled to maintain the suit. Both the lower Courts find that the plaintiff was appointed trustee by Nilambal Achi, but it is contended for the appellant that this appointment is invalid. Neelambal Achi had previously executed a deed of settlement, Ex. A, dated 23rd November 1899, under which she appointed one Kandaswami Thevar, her cousin, and his sons and grandsons and so on for generations to continue to conduct the said charities after her lifetime for ever, and it is contended that having appointed Kandaswami Thevar she had not thereafter power to appoint another trustee. Kandaswami Thevar died in 1914 during her lifetime and probably because he showed no inclination to undertake the trust, Nilambal appointed the plaintiff as trustee in 1913 and though the appointment of the plaintiff might have been invalid and useless in the event of Kandaswami Thevar surviving Nilambal Achi and accepting the trust, I do not see why the appointment should be held to be invalid in the events that happened, namely Kandaswami having predeceased Nilambal Achi and his two widows not accepting the trust.

In the first place I doubt whether the words "sons, grandsons and so on for generations" in Ex. A should be construed as words of limitation and not as words of purchase. It is true that if an estate is granted to a person and his sons and grandsons for generations these words

(4) [1916] 32 I. C. 908.

(5) A. I. R. 1914 Mad. 686=26 I. C. 66.

(6) A. I. R. 1926 Pat. 255=94 I. C. 13=5 Pat. 168.

merely indicate the nature of the estate taken by the grantee, namely, an absolute estate. One may also assume that this rule applies even to trusteeship; but in the present case the document does not say that the trusteeship is conferred upon Kandaswami Thevar, his sons and grandsons and so on for generations but it simply says that the said dharmas ought to be conducted after her lifetime and Kandaswami Thevar and his sons and grandsons and so on for generations should continue to conduct for ever the said charities.

Even assuming that this sentence can be regarded as a sentence conveying trusteeship to Kandaswami Thevar absolutely, seeing that Kandaswami has not accepted the trusteeship during the lifetime of Nilambal Achi, though the trusteeship was to take effect only after her death and seeing that he did not survive Nilambal so as to have an opportunity of accepting it after her death, it seems to me that the trusteeship never vested in him at all and did not descend upon his heirs. The learned Advocate General contended that even if Kandaswami Thevar did not accept the trusteeship during the lifetime of Neelambal Achi it was open to his heirs to accept it after Neelambal's death, because he contends that the estate conferred by the document which is not a will but a deed of settlement is a vested estate in the trusteeship after Neelambal's death, that is a vested remainder in the trusteeship. This might have been so if Kandaswami had accepted the trusteeship during Neelambal's lifetime, [*Krishna Pillai v. Arunachela Chettiar* (7)], but as he never accepted it I think the estate conferred by the settlement deed remained only a contingent estate and when he died there was nothing to be transmitted to his heirs. No authority has been cited on either side in support of the respective contentions on this part of the case and the matter is one of first impression, and I hold that in such a case no estate descended upon the heirs. On this view the plaintiff is a validly appointed trustee, even though he was appointed without waiting for Kandaswami's refusal. But even assuming that the above view is incorrect and that some estate descended to the heirs of Kandaswami we have to see the conduct of Kandaswami's heirs. Kandaswami left two widows and these

are defendants 4 and 5 in the case. Defendant 4 is a sister of defendant 2 and half-sister of defendant 1. They filed a written statement which shows that they were not anxious to have the trusteeship and that they were anxious to support defendants 1 and 2. Their statement in para. 6 of the written statement shows that their attitude is adverse to the trust. The mere fact that they proceed to state further:

"If the Court holds that Neelambal Achi was legally entitled to endow the said properties for charities, we are prepared to manage the same," cannot conceal the fact that they were really in collusion with defendant 1 who was acting adversely to the trust, and their primary contention being that Neelambal Achi had no power to endow the suit property for charities, they must be taken not to have accepted the trust and their willingness to manage the trust on the happening of some contingency cannot be regarded as an acceptance. On this ground also the appointment of the plaintiff as trustee becomes operative. But even if I am incorrect in the view I have taken about the construction of the written statement, still it is now clear that the plaintiff is the only trustee who is willing to act because, after the decree of the lower appellate Court, defendant 5 never filed an appeal to the High Court. Defendant 4 filed S. A. No. 1233 of 1927. She died and the appeal abated. So far as defendant 5 is concerned, taking her written statement with her subsequent conduct in not appealing, one must infer that she is not anxious to be a trustee. Once the finding that there is a trust is reached, it is the idol that is really entitled to the suit properties. Who exactly should be the trustee representing the idol is really a different matter. Any difficulty in deciding that question ought not to prejudice the rights of the idol. It has been held in several cases that a de facto trustee can maintain a suit to recover trust properties: see *Mahomed Ibrahim v. Sundaram Chetti* (8), *Benarasi v. Altaf Hossain* (9), *Kasi Chetti v. Srimathu Devasikamony Nataraja* (10) and *Moideen Bibi v. Rathnavelu Mudali* (11). It is true that in the decision in *Kasi Chetti v. Srimathu Devasikamony Nataraja* (10) the plaintiff was in posses-

(8) A. I. R. 1926 Mad. 1066=96 I. C. 823.

(9) [1921] 63 I. C. 171.

(10) [1913] 16 I. C. 622.

(11) A. I. R. 1927 Mad. 69=98 I. C. 812.

(7) [1908] 18 M. L. J. 304.

sion of the property in suit and it was held that he was entitled to maintain a suit to eject a tenant. But it is not clear from the other cases that the prior possession in the de facto trustee was an essential element in upholding his right to maintain the suit. It is clear from the cases mentioned above that the conclusion arrived at in those cases was not based upon the well-known principle that a person without title, but who had possession, can maintain a suit to recover possession from a trespasser who does not claim under leave and licence of the lawful owner, but on a different principle, namely, that a de facto manager of a trust should be allowed to maintain a suit which is for the benefit of the trust in spite of some defect in his title as trustee. This, of course, does not mean that any person can call himself a trustee and maintain a suit to recover trust properties from trespassers. It is not that a de facto trustee is like a next friend of a minor; but in the present case the plaintiff is a person appointed trustee by Neelambal Achi. He entered on the duties of the trustee. He leased out suit properties to defendant 3. It is by reason of bona fide acts of this kind that he should be regarded as the de facto trustee, and I think as such de facto trustee he is entitled to maintain the suit whether he actually had prior possession or not. But even if it were otherwise the right to possession in Neelambal Achi certainly passed to him for it is now found that he is the reversioner to Neelambal's estate. That would be enough to enable him to maintain the suit.

For all these reasons the second appeal fails and is dismissed with costs.

P.R.S./K.N. *Appeal dismissed.*

A. I. R. 1932 Madras 271

CURGENVEN, J.

President, District Board, Tanjore — Complainant—Petitioner.

v.

Adam Ghani Rowther — Accused — Opposite Party.

Criminal Revn Case No. 599 of 1931, Criminal Revn. Petn. No. 540 of 1931, Decided on 12th November 1931, against decision of Second Class Magistrate, Nidamangalam, in C. C. No. 38 of 1931.

Madras Local Boards Act (1920), S. 223 — Person can be prosecuted within three months of expiry of period of license.

If a person does an act for which a license is required, and fails to obtain a license, he may be

prosecuted within three months of the expiry of the period for which the license, if granted, would have been current. Therefore a complaint made against a person for using a motor bus for hire without a license within three months of the expiry of the period for which the license, if granted, would have been current, is within time: 108 I. C. 411, *Foll.*; A. I. R. 1930 Bom. 340 and A. I. R. 1929 Rang. 122, *Dist.*

[P 272 C 2]

P. Venkataramana Rao — for Petitioner.

K. Swaminathan for A. V. Viswanatha Sastri—for Opposite Party.

Public Prosecutor—for the Crown.

Order—This petition has been filed by the President of the District Board, Tanjore, against a judgment acquitting the respondent of the offence of using a motor vehicle for hire without a licence. Such an act is prohibited by S. 166 (1), Madras Local Boards Act, (Madras Act 14 of 1920 as amended by Act 11 of 1930), and is rendered punishable by S. 207 read with Sch. 8. The lower Court has found indeed that the respondent used his motor bus for hire without taking out a licence, but it considers that complaint was not made within the time prescribed by S. 223.

The question turns upon the construction of that section. It provides that no person shall be tried for an offence under the Act

“unless a complaint is made by the police, or the President of a Local Board, or by a person expressly authorized in this behalf by the Local Board or its President within three months of the commission of the offence.”

To the section is added this proviso:

“Provided that failure to take out a licence or obtain permission under this Act shall for the purposes of this section be deemed a continuing offence until the expiration of the period, if any, for which the licence or permission is required, and if no period is specified, complaint may be made at any time within 12 months from the commencement of the offence.”

It is urged for the petitioner that the offence being a continuing one until 31st December 1930, when the period expired for which the licence was required, a complaint made within three months of that date, as was the case here, would be in time. For the respondent I am asked to hold with the lower Court that that time must be reckoned from the commencement of the continuing offence, i. e., from the date, 1st October, from which the licence which was issued quarterly, should have been taken out.

In *Emperor v. U Thin Ohn* (1), a question of this kind arose under the City of

(1) A.I.R. 1929 Rang. 122=117 I. C. 250=30 Cr. L.J. 754=7 Rang. 23.

Rangoon Municipal Act in connexion with a case of keeping a private market without a licence; but I have been unable to apply the reasoning there employed, because the learned Judge who decided the case based his decision upon the date when the Commissioner of the Corporation came to know that the offence was being committed. I have not seen the Rangoon Act; but such a test will not, I think, accord with the terms of the Madras Act. There is however this principle recognized in the decision, that time has not to be counted from the point when commission of the offence began. That was the view taken in *Emperor v. Becharadas* (2). The prosecution there was for allowing to remain undemolished a house constructed in contravention of Municipal Regulations, and the learned Judges point out that any other construction placed upon provisions of this character would in such circumstances enable the Municipality to prosecute the owner of a completed building after any period whatever. The same considerations certainly do not arise here, where the owner of the motor bus breaks the law every time he uses it without a licence. On the other hand, I have been referred to a case of this Court, *Arthur v. Appavu Velan* (3) where Devadoss, J., held that a person who kept an unlicensed potter's kiln was liable to prosecution at any time within three months of the expiry of the period during which the licence, if it had been granted, would have been current.

This last case is, I think, clear authority for the view put forward for the petitioner. It is objected that, on the wording of the proviso, it is not possible to apply it to the circumstances of such case as the present; that the offence does not really consist, as the proviso would require, in a failure to take out a licence, but in an act, or a series of acts, of using a motor vehicle without licence; and that the section, without the proviso, requires that the period of three months should embrace that act or series of acts. Verbally, no doubt, there is some ground for a criticism of this kind. But I think that the intention of the section, read with its proviso, is clear. The essential part of the offence, from the point of view of the District Board, is a failure to take out a

licence, on the part of a person who has by his conduct obliged himself to do so, for the period under reference here the last quarter of 1930. It is not very material when and on how many occasions he used his bus during that quarter. Even if he used it only once he was no less bound to obtain a licence for the whole quarter. The terms of the proviso support this view by allowing in such cases a period of three months from the date when the licence would have expired, for complaint to be made. The rule accordingly is simply this. If a person does an act for which a licence is required, and fails to obtain a licence, he may be prosecuted within three months of the expiry of the period for which the licence, if granted, would have been current. That, I think, is what the proviso, read with the section, means, and so construed it does not seem to afford undue opportunity for delay in taking action.

I conclude therefore that the complaint in the present case was within time. Since the learned Second Class Magistrate has not recorded any finding upon the facts I allow the petition, set aside his order of acquittal and direct him to dispose of the case in the light of the foregoing observations.

P.R.S./K.N.

Petition allowed.

* * A. I. R. 1932 Madras 272

CURGENVEN, J.

Alapati Venkataramayya and others—
Defendants—Appellants.

v.

Alapati Nagamma—Plaintiff—Respondent.

Second Appeal No. 773 of 1930, Decided on 28th August 1931, against decree of District Judge, Guntur, in Appeal Suit No. 265 of 1928.

* * (a) Transfer of Property Act (as amended by Act 27 of 1926), S. 3—Attestation—Deed executed in 1912—Attesting witnesses putting their marks—In view of amending Act, such witnesses are not valid attesting witnesses.

Where an amendment has expressly been made retrospective in effect, it is not open to the Court to refuse to act upon it merely because a particular thing was done long before the amendment came into operation and to hold that it was done rightly if according to the amendment it is not legal on the date of suit.

A mark by an attesting witness therefore although valid at the date of execution of a deed of gift made in 1912 should be held to be inoperative in view of the law as amended on the point by Act 27 of 1926 and it cannot be said to

(2) A.I.R. 1930 Bom. 340=127 I.C. 181=31 Cr. L.J. 1159.

(3) [1928] 108 I.C. 411.

be a valid attestation so long as there is not the signature of the witness to the document: 3 *Bom.* 382 and 11 *Cal.* 429, *Ref.* [P 274 C 1]

* (b) **Transfer of Property Act (1882)—Attestation—Person signing for executant cannot be attesting witness.**

A person who signs on behalf of the executant of a document cannot also sign as an attester of it: *A. I. R.* 1922 *Cal.* 168 and 40 *Mad.* 550, *Ref.* [P 274 C 2]

* (c) **Transfer of Property Act (1882), S. 3—Registrar cannot always be attesting witness.**

Where no proof is adduced that the Sub-Registrar signed a particular document in the presence of the executant, he cannot be accepted as an attester to the said document: *A. I. R.* 1931 *Mad.* 335, *Foll.*; *A. I. R.* 1928 *Cal.* 154, *not Foll.* [P 274 C 2]

* * (d) **Hindu Law — Gift—Acceptance—Gift by mother to her son and his wife—All living together—Acceptance was inferred.**

Where a gift is made of a house by the mother to her son and his wife, while they were both minors, and afterwards the donees and the husband's parents, who alone could accept the gift on behalf of the minors, continued to live in the house, acceptance of the gift should be inferred unless the contrary is proved. The mere circumstance that the mother retained custody of the deed and kept the house in her name in the Municipal accounts and paid the taxes, does not show that she did not intend the gift to be acted upon: 41 *I. C.* 389, *Ref.*; *A. I. R.* 1929 *P. C.* 77; *A. I. R.* 1922 *All.* 44 and *A. I. R.* 1928 *Lah.* 9, *Dist.* [P 275 C 1]

(e) **Interpretation of Statutes—Retrospective operation—Rule.**

If an amendment is retrospective in effect, the Court cannot refuse to act upon it merely because a particular thing was done long before the operation of the amendment. [P 274 C 1]

B. T. M. Raghavachari—for Appellant.

V. Pattabhirama Sastri—for Respondent.

Judgment.—The suit out of which this second appeal arises was to recover possession of a house under a gift-deed executed by the mother (defendant 2) of the plaintiff's late husband, Subbayya, jointly to Subbayya and herself. The claim was resisted upon various grounds, the first with which I propose to deal being the question of attestation of the deed. It purports to have been attested by five persons, two being signatories and three marksmen. If the plaintiff fails to establish two valid attestations amongst these, there are the further contentions that the writer of the document and the Sub-Registrar who registered it may be held to rank as attestors.

Of the two signatories one has not been traced and there is no evidence which would allow the Court to conclude that he validly attested the document. The other has been examined as P. W. 7 and

although he himself has stated in evidence that he did not see the executant sign, the learned District Judge has accepted the evidence of P. Ws. 9 and 10 who state that he attested the document. This assertion was not made the subject of cross-examination and I think that it must carry with it the implication that it was a valid attestation within the terms of the definition added to S. 3, T. P. Act, by Act 27 of 1926.

We turn then to the attestations by the three persons unable to sign their own names. On the same evidence, that of P. Ws. 9 and 10, the learned District Judge has found that the attestation of one of them, P. W. 8, is valid, but this attestation has been attacked upon the general ground that as the law now stands a person who cannot sign his name is not qualified to attest a document. Before the law was amended as stated above, there can be no doubt that a marksman could be accepted as an attester. For purposes of non-testamentary documents there was no definition of "attest" and under S. 3 (52), General Clauses Act, it was permissible to hold that "sign" included "mark." I think however that the effect of Act 27 of 1926 in introducing a definition has altered the law in this respect. It is true that there is no case-law directly in point but the definition is in precisely similar terms to that contained in the Succession Act as applying to the execution of wills. It is reasonable therefore to hold that, unless the contrary appears from the context in which each definition is to be found, words construed in a certain sense in the one must be construed in the same sense in the other. It has been held both in *D. Fernandes v. R. Alves* (1) and in *Nityagopal Sircar v. Nagendranath Mitter* (2) that the direction contained in S. 50 (3), Succession Act 1865 (now S. 63 (c) of the present Succession Act), as to the signature of witnesses attesting a will is not satisfied by the witnesses affixing their marks. In the latter case it is pointed out that the legislature, while speaking of the action of the testator, uses expressions "shall sign or affix his mark" "signature or mark". In speaking of the witnesses the section does not use any alternative expression but simply says "the witnesses must sign".

(1) [1878] 3 *Bom.* 382.

(2) [1885] 11 *Cal.* 429.

"That being the case," the learned Judges say: "we cannot help thinking that the legislature advisedly drew a distinction between the action of the testator and that of the witnesses as regards the mode of their respective signatures."

This construction of the language used has no reference to the fact that the document in question is a will and I cannot find any ground in this circumstance to distinguish these cases. It will be apparent that the reasoning used is derived purely from the wording of the definition, which is the same in both cases; and since I cannot suppose that the legislature was unaware of these decisions when it extended the definition to the attestation of nontestamentary documents, I can only infer that the same construction was intended in the one case as in the other. Certainly insistence upon the attestation of such documents by persons who can sign their names would not lead to more hardship or inconvenience than in the case of wills, which often have to be executed at very short notice. There is an undoubted hardship in applying the principle to such a case as the present, where the document was executed as far back as 1912, long before the law was amended. But inasmuch as that amendment has expressly been made retrospective in effect it is not open to me to refuse to act upon it merely because illiterate persons were formerly accepted as capable of attesting. I must hold accordingly that none of the three so-called attestations by marksmen is valid.

We come then to the writer. Two objections have been raised to accepting him as an attester. In the first place it is said not to have been shown that he intended to attest the execution. I should have been prepared to overrule this objection, because he signed after the attestors, and the evidence I think allows the presumption that he signed in the presence of the executant. But the other objection appears to me fatal. The executant of the gift-deed was herself unable to sign her name and it is clear from the evidence and from an examination of the document that her name was affixed to it by the writer himself. It has been held both in *Sristidhar Ghosh v. Rakky Kaly Dasi* (3), and in a case of this Court, *Radhakrishna Mudaliar v. Subbaraya*

Mudaliar (4), that a person who signs on behalf of the executant of a document cannot also sign as an attester of it. The former case related to a mortgage bond and the latter to a will, but there seems to be no difference in principle. The document must have been attested by

"two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument or has seen some other person sign the instrument in the presence and by the direction of the executant,"

which means that it must be attested by two persons other than the person who signed the instrument in the presence and by the direction of the executant. We have accordingly to exclude the writer upon this ground. There remains the Sub-Registrar. The learned District Munsif was inclined to exclude him because he does not necessarily sign in the presence of the executant, as the rule requires, and no proof was adduced that he in fact did so sign. In the absence of a decision of this Court he felt himself bound however to follow *Radha Mohun Dutt v. Nripendranath Nandy*, A.I.R. 1928 Cal. 154. There is now a case in point decided by this Court in *Ramanathan v. Delhi Badha Tevar* (5). It was there held by the learned Chief Justice and myself that proof must be adduced that this term in the requirement was complied with. There being no evidence upon this point I must hold that the Sub-Registrar also cannot be accepted as an attester. The result accordingly is that only one person can be declared to have validly attested the document, which being a gift-deed must therefore fail for lack of due attestation. This conclusion no doubt involves some hardship to the plaintiff, but unless my application of the law as it stands at present is at fault I do not see how a different decision can be arrived at.

The gift deed has been further attacked on the ground that the gift made was not accepted by the donees. It was made to a husband and wife while they were minors by the husband's mother. The plaintiff has indeed contended that they were of age at the time, but this has been found against, although I do not think that the finding should bar the plea of acceptance if it may reasonably be inferred from the facts. The subject-matter was a house in which the parties continued to live with

(3) A. I. R. 1922 Cal. 168=63 I. C. 507=49 Cal. 438.

(4) [1916] 40 Mad. 550=34 I. C. 849.

(5) A. I. R. 1931 Mad. 335=131 I. C. 840.

the husband's parents until the husband died some 11 years later. Under these circumstances it is difficult to see by whom, if not by the parents, acceptance could have been made at the time of the gift. The issue throws the burden of disproving acceptance upon the defendants and I think that in such a case as this the English rule should be followed that unless the contrary is proved acceptance of the gift should be inferred. The mere circumstance that the mother retained custody of the deed and kept the house in her name in the Municipal accounts and paid the taxes, does not show that she did not intend the gift to be acted upon. I do not agree that it was onerous in character. All that the donees had to do was to live together as husband and wife, with a provision for divestment should either fail to do this. No case has been cited to me in which it has been held that a gift made in such circumstances is invalid for failure to prove acceptance. The circumstances in *Hariram Serowgee v. Madan Gopal Bagla* (6), were quite different, the only evidence of an intention to make a gift being furnished by certain entries in an account. No doubt *Debi Singh v. Bansidhar* (7) and *Dhannamull v. Parmeshari Das*, A. I. R. 1928 Lah. 9, cited to me on behalf of the plaintiff, raise the question rather of the completion of the gift by the donor than of its acceptance by the donee. But in *Muhammad Abdul Nayeem v. Jhoti Mahton* (8), an inference of acceptance was drawn from the circumstances of the case, which I think it would be equally reasonable to draw here. I am not therefore disposed to interfere with the findings of the lower Courts upon this issue.

The only other point is that the learned District Judge while finding that the plaintiff had not been guilty of immorality during her husband's lifetime has not recorded a finding on the question whether she lived separately from him. It appears to me from the terms of issue 4 that these two questions were aspects of the same matter and that the finding with regard to the plaintiff's chastity covers the other point. In view of my finding on the question of attestation I must allow the second appeal, and set aside the decrees of the lower Courts so

far as they relate to this property. The decree will stand as regards the payment of Rs. 7-2-0. In the circumstances the parties will pay their own costs throughout.

P.R.S./K.N.

Appeal allowed.

A. I. R. 1932 Madras 275

REILLY & ANANTAKRISHNA AYYAR, JJ.

U. Latchayya—Defendant—Appellant.
v.

G. Seethamma and others—Plaintiffs—Respondents.

Letters Patent Appeal No. 67 of 1927, Decided on 28th September 1931, against decision of Waller, J., reported in A. I. R. 1927 Mad. 1144.

(a) **Specific Relief Act (1877), S. 31—Decree—Suit for rectification of, on ground of common mistake in instrument forming basis of decree is not maintainable.**

A suit for rectification of a decree passed in a previous suit is not maintainable on the ground that by a common mistake of the parties a wrong survey number was inserted in description of the mortgaged property as described in the mortgage on which the prior suit was based and was thence wrongly copied in the plaint and finally inserted in the decree passed in that suit: A. I. R. 1931 Pat. 296 and 43 Cal. 217, *Foll.*; A. I. R. 1921 Cal. 730; and 8 C. W. N. 473, *not Foll.*; 2 Pat. L. J. 313, *Ref.* [P 278 C 1]

(b) **Specific Relief Act (1877), S. 39—Although decree in previous suit based on mistake cannot be rectified, mortgage deed on which the decree is based can be rectified—Proper remedy then is to get plaint amended and then to apply under Civil P. C. (1908), S. 152—Practice, Relief.**

The fact that a mortgage has ripened into a decree for sale is not enough to preclude the Court from rectifying the mortgage deed in proper cases when that can be done for proper purposes.

[P 278 C 2]

Where a suit is for a rectification of a mortgage and also of the decree based on it, the fact that the relief for the rectification of the decree, which cannot be granted, has been asked for is no ground for dismissing the suit altogether. In such case plaintiff can obtain a decree for rectification of the mortgage and after obtaining such a decree, he can apply for amendment of the plaint in the previous suit and for a review of the decree on the ground that there was an error patent on the face of the record as it would be patent after the amendment of the plaint. He may also without applying for review, ask for amendment of the decree in the previous suit under S. 152, Civil P. C. [P 279 C 1, 2]

K. Bhimasankaran for *B. Satyanarayana*—for Appellant.

R. Kasturi Seshagiri Row for *B. Somayya*—for Respondent.

Reilly, J.—In 1906 the brother of defendant 1 mortgaged some land to the mother of the three plaintiffs. After their mother's death the plaintiffs in 1919 brought a suit for sale on that mortgage,

(6) A. I. R. 1929 P. C. 77=114 I. C. 565 (P.C.).

(7) A. I. R. 1922 All. 44=66 I. C. 480.

(8) [1917] 41 I. C. 389.

O. S. No. 302 of 1919, on the file of the District Munsif of Razole, and got a preliminary decree. There was no appeal against that decree. Not long after that decree had been made the plaintiffs discovered that in the mortgage deed Survey No. 166 had been entered by mistake for Survey No. 168, and that that mistake had been repeated in their plaint and in the decree which they had obtained. They then brought the present suit, praying for rectification of the mortgage deed by the substitution of Survey No. 168 for Survey No. 166 and for a similar rectification of the decree in O. S. No. 302 of 1919. It was found both by the District Munsif and by the Subordinate Judge on appeal in the present suit that there had been a common mistake by the parties to the mortgage deed and that in consequence of that mistake Survey No. 166 had been entered in the deed when the parties intended to deal with Survey No. 168. That finding of fact in regard to the common mistake made is binding upon us. The District Munsif ordered rectification, as prayed by the plaintiffs, both of the mortgage deed and of the preliminary decree, and that decision was confirmed by the Subordinate Judge on appeal. Defendant 1 preferred a second appeal to this Court which was dismissed by Waller, J. The present appeal is again by defendant 1, against Waller, J.'s., decision.

Waller, J., in a brief judgment remarks that it has been contended before him that, though the mortgage deed might be rectified, the decree made upon it could not be rectified in the suit. That contention he overruled on the strength of *Bepin Krishna Ray v. Jogeshwar Ray* (1) and *Venkatarama Ayyar v. Elumalai Naicker* (2). We have examined the records in *Venkatarama Ayyar v. Elumalai Naicker* (2), so far as they are available, and that case does not appear to be capable of the interpretation which Waller, J., put upon it. It is not clear from the records available whether the decree in the first suit was ever rectified in the second suit; but it is quite clear from the judgment of Schwabe, C. J., in the second appeal that he found no rectification even of the deed to be necessary as the land was in his opinion sufficiently identified by the description originally given in the deed and in the decree in the first suit. Nor was

there any discussion in his judgment, with which Wallace, J., agreed, of the question whether the decree in the first suit could have been rectified in a second suit. But *Bepin Krishna Ray v. Jogeshwar Ray* (1) is a clear authority, if it is to be followed, in support of Waller, J.'s., judgment. That was a decision of Mookerjee and Buckland, JJ., of the Calcutta High Court. There in the second suit the mortgage deed and the decree obtained upon that mortgage deed in a previous suit had been rectified. It was found that there had been a common mistake in making the mortgage deed and the decision was that the deed and the decree obtained upon it might both be rectified in the second suit, provided that would not infringe the rights of any third party acquired in good faith and for value, as the learned Judges found that it would not.

That decision was followed a short time afterwards by Mookerjee, J., himself and Cuming, J., in *Kailas v. Bijay* (3), but without any further discussion. It is in conflict with an earlier decision of Jenkins, C. J., and Holmwood, J., in *Kusodhaj Bhukta v. Braja Mohan Bhukta* (4), and in conflict with another earlier decision of a different Bench of the Calcutta High Court in *Bhonda Singh v. Dowlat Roy* (5). In the previous suit which led to *Kusodhaj Bhukta v. Braja Mohan Bhukta* (4), the plaintiff had claimed a one-third share of certain property, and the Judge in his judgment had found that he was entitled to that share. But in the decree by some accident a half-share was provided as the share which the plaintiff was entitled to recover. In the second suit, which came before the High Court as *Kushodhaj Bhukta v. Braja Mohan Bhukta* (4), one of the defendants in the previous suit sued to set aside the decree in the previous suit on the ground of mistake. Jenkins, C. J., and Holmwood, J., found that such a suit, to set aside the decree in the previous suit on the ground of mistake was unsustainable. They referred to a previous decision of a Bench of the Calcutta High Court, *Jogeshwar Atha v. Ganga Bishnu* (6), in which it had been held that such a suit to set aside a previous decree was possible; but

(1) A. I. R. 1921 Cal. 730=66 I. C. 345.

(2) A. I. R. 1923 Mad. 442=72 I. C. 464.

(3) A. I. R. 1923 Cal. 18=72 I. C. 680.

(4) [1916] 43 Cal. 217=31 I. C. 13.

(5) [1912] 14 I. C. 93.

(6) [1904] 8 C. W. N. 473.

Jenkins, C. J., pointed out that that decision was based on a misapprehension of the law in England as disclosed by a case which had been cited, namely, *Ainsworth v. Wilding* (7).

In *Bepin Krishna Ray v. Jogeshwar Ray* (1) the decision in *Jogeshwar Atha v. Ganga Bishnu* (6) was followed; but the reason Jenkins, C. J., had pointed out why that case should not be regarded as a sound precedent does not appear to have been observed. With great respect I am not able to understand exactly how the learned Judges in *Bepin Krishna Ray v. Jogeshwar Ray* (1), came to the conclusion that the second suit to set aside a decree in a previous suit upon the ground of mistake was possible, nor how it was that they felt themselves at liberty to differ from the decision of Jenkins, C. J., and Holmwood, J., in *Kusodhaj Bhukta v. Braja Mohan Bhukta* (4). In *Mahindra Narain v. Mt. Lal Jhari Kuer*, A. I. R. 1931 Pat. 296, Wort, J., held that a suit for rectification of a decree in a previous suit and for delivery of property in accordance with the rectified decree could not be sustained in this country any more than it could in England. And in *Janakdular Saran v. Ambica Prasad* (8), Chapman, J., expressed the opinion obiter that Courts in India should refuse relief against previous judgments on the ground of mistake in pleadings or in the conduct of cases.

To attack by a second suit the decree in a previous suit between the same parties is, speaking generally, against the principle of *res judicata*. It is recognized that there are certain classes of cases in which it is possible for one of the parties to a decree to attack it in a second suit. For instance, a compromise decree may be attacked in a subsequent suit by one of the parties to it on the ground of mistake, as indeed it can be attacked upon other grounds such as fraud, misapprehension, coercion, etc. But that is not really in conflict with the principle of *res judicata*, because such a compromise decree is not the result of adjudication between the parties. It is merely the contract between the parties put into the form of a decree, and so it can be attacked subsequently in the same way in

which a contract or the document embodying a contract can be attacked. In such cases the decree is indeed itself the instrument of contract, made by the hand of the Court but by the will of the parties. Such compromise decrees can be attacked as contracts can be attacked for such reasons as I have mentioned, or in cases where one of the parties is a guardian acting for a minor without the consent of the Court, as in *Ganesh Row v. Tuljaram Row* (9), or where one of the parties is a minor ostensibly represented by a guardian who has not been properly appointed, as *Partab Singh v. Bhabuti Singh* (10). Then there are cases in which it is alleged that the previous decree has been obtained by fraud. It is well known that a second suit may be brought to set aside a previous decree between the parties on the ground that it was obtained by fraud.

There again there is no conflict with the principle of *res judicata*, because in such cases there has been no real and true adjudication between the parties. As was said long ago "Fraud vitiates everything" or, as Lord Coke said "Fraud avoids all judicial acts." If it can be shown that a decree in a previous suit has been obtained by fraud, the very foundation of that decree has gone; what was supposed to have been a decision founded on the rights of the parties is shown to rest on iniquity and deception. Both these two classes of cases, where the previous decree can be shown to have been obtained by fraud, we can put upon one said as not affecting the question whether decrees made after real adjudication between the parties can be attacked by any of them in a subsequent suit. As Wort, J., pointed out, judgments cannot be attacked in that way in subsequent suits or actions in England. Before the Judicature Act, 1873 the Court of Chancery could interfere with the proceedings of the Courts of Common law by injunctions; but so far as I am aware, even the Court of Chancery could not formally set aside a judgment of one of the other Courts, and certainly that cannot be done since the Judicature Act, 1873. If that cannot be done in England, why is it possible to do it in India? There are various ways of attack-

(7) [1896] 1 Ch. 673=65 L. J. Ch. 432=74 L. T. 193=44 W. R. 540.

(8) [1917] 2 Pat. L. J. 313=39 I. C. 126.

(9) [1913] 26 Mad. 295=19 I. C. 515 (P. C.).

(10) [1913] 35 All. 487=40 I. A. 182=16 O. C. 247=21 I. C. 283 (P. C.).

ing a decree by appeal, review, amendment, applications to set aside ex parte decrees and applications to restore suits which have been dismissed ex parte.

But what we are asked to say in this case is something quite different, that a decree made between the parties and final between them can be attacked in a subsequent suit and rectified on the ground of mistake. It is well known that a right of appeal does not exist except when it is given by statute or statutory provision. How can this right to attack a previous decree arise, and how can it exist consistently with the principle of *res judicata*? If there were any doubt about the matter, the fact that our procedure provides so many other ways of attacking a decree when necessary and provides them explicitly might be taken as an indication that this supposed method of attack by a subsequent suit did not exist. In my opinion this suit, so far as it was for rectification of the decree in O. S. 302 of 1919, was not sustainable.

On that Mr. Bhimasankaran, who appears for defendant 1, would have us say that the whole suit should have been dismissed. But the suit was not only for the rectification of the decree; it was also for the rectification of the mortgage-deed, and that was in itself clearly an admissible prayer. Mr. Bhimasankaran however contends that, as the mortgage deed has ripened into a decree in O. S. No. 302 of 1919, the mortgage deed has been swallowed up in the mortgage decree and no longer remains for rectification. He would have us apply the principle that, when a mortgage-decree for sale has been obtained, the mortgage security has been extinguished and the decree for sale has been substituted for it, as laid down by Lord Haldane in *Het Ram v. Shadi Ram* (11). But although the mortgage may have been extinguished by the mortgage decree, does it follow that the mortgage deed can no longer be rectified? What a mortgage decree for sale gives is the right to sell the mortgaged property, whatever it may be. Is it impossible after such a decree has been made to show in necessary cases what the mortgaged property is and in order to do that to get the mortgage deed rectified? In such a case, as in all cases of rectifica-

tion of instruments, it is not the contract which is being corrected—that can never be done but it is the instrument embodying the contract incorrectly which has to be rectified. I do not think that the fact that the mortgage has ripened into a decree for sale is not enough to preclude the Court from rectifying the mortgage deed in proper cases when that can be done for proper purposes.

It has been suggested at a late stage in this case that the plaintiffs are guilty of laches. That might well be an argument in some cases against a plaintiff who asked for rectification after he had himself sued upon his document and got a decree upon it; but it cannot be put forward necessarily in all such cases. And it may be remarked that no such contention was so far as we can see, ever put forward in any of the Courts before which this case has come until today. It must be noticed that in this case the original mortgagee was a woman, probably an illiterate woman. She was not responsible in any way, so far as we can see, for the misdescription of the property in the mortgage deed. And the plaintiffs are not the original mortgagees; they come into this matter only as daughters and heirs of their mother, the original mortgagee, and were not responsible in any way for the mistake which has been made. In these circumstances I do not think we can attach any weight to this very belated accusation of laches.

But there are of course limits after which rectification of an instrument will not be made. The limit stated in S. 31, Specific Relief Act, is when third parties have acquired rights in good faith and for value. But that does not apply in this case. There is also another limit, which, as Mr. Bhimasankaran has contended, is exemplified in *Caird v. Moss* (12), where a decree has been obtained upon an unrectified instrument, and that decree has been executed and the money or property concerned has been recovered. *Caird v. Moss* (12) rests upon the old case of *Marriot v. Hampton* (13), that the money paid under legal process cannot be recovered, and it was on that principle that in *Caird v. Moss* (12) the Judges of the Court of appeal refused to allow rectification of the deed after judgment had been

(11) A.I.R. 1918 P. C. 34=45 I. C. 798=45 I. A. 130=40 All. 407 (P.C.).

(12) [1886] 33 Ch. D. 22.

(13) 7 I.R. 269=2 Sm. C. C. 481=4 R.R. 439=101 E. R. 969=2 Esp. 546.

obtained upon it and the money concerned had been recovered and distributed. That too does not apply in this case. We are here still in the stage of a preliminary decree. In my opinion it was not too late in the circumstances when the plaintiffs came forward and prayed for rectification of the mortgage deed.

And I see no difficulty in separating the mortgage deed for this purpose from the decree which was obtained upon it. Mr. Bhimasankaran contends that even the rectification of the deed is not possible because the plaintiffs are shut out after the decree in the previous suit by the rule embodied in Expl. 4, S. 11, Civil P. C., that

"any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

Can we say that this ought to have been a matter of attack in the previous suit? Possibly it might have been urged, if it were the defendants who were seeking rectification, that it ought to have been made a matter of defence in the previous suit that a decree was asked for on the basis that the plaintiffs should bring to sale land which was never mortgaged. But here it has been found that both the parties to the deed made a mistake in having Survey No. 166 entered for 168. In my opinion we certainly cannot apply the principle of the explanation to the plaintiffs.

So far as I can see therefore there is no reason why the decree made in favour of the plaintiffs for the rectification of the mortgage-deed should not stand. Now, if the plaintiffs could get so far as that, why could they not get what they want in this matter? If the mortgage-deed is rectified and the right survey number is entered in it, though a wrong survey number was copied into their plaint in O. S. No. 302 of 1919 from the deed as it then stood, why could they not apply for amendment of their plaint? An amendment of a plaint may be applied for at any stage in the proceedings; and in this case we have not even got to execution proceedings—the suit is still pending, and a final decree has not yet been made. Certainly such an application for amendment would be very late now and would have been very late at the date of the plaint in the present suit. But in the circumstances it might have been

made, and I do not see any reason why it should have been refused. Amendments have been allowed by this Court as late as execution proceedings, as is shown by *Appassa Rowthen v. Muhammad Rowthan* (14), and the cases quoted in it. And, if the plaintiffs got to that stage and had their plaint amended, what would prevent them from going to the Court which had disposed so far of their first suit, O. S. No. 302 of 1919, and applying for review of the preliminary decree on the ground that there was an error patent on the face of the record, as it would be patent if the survey number were altered in their plaint? That is a course they could have adopted and can adopt now. They might even I think in such a case as this without applying for review ask the District Munsif to amend his decree under S. 152, Civil P. C. Whichever of these courses were adopted, they would arrive at the same position at which they have now arrived, namely, their preliminary decree would be amended. It must be noticed that in this case the second suit was brought in the same Court as the first suit, so that there is no difficulty about their decree having been amended by another Court. In my opinion the plaintiffs in this case adopted the wrong course. They sued for rectification of their decree on the ground of mistake, which, so far as I can see, was an inadmissible prayer. But they got the amendment of that decree, which is exactly what they might have got by first getting their mortgage-deed rectified and then amending their plaint and applying for review of the preliminary decree or amendment of that decree under S. 152, Civil P. C. That being so, although in my opinion they have adopted the wrong course, I can see no reason why at this stage we need interfere with Waller, J.'s. decree, and I would dismiss this appeal with costs.

Anantakrishna Ayyar, J.—I agree. The plaintiffs represent the mortgagees. Defendants 1 and 2 represent the mortgagors (the mortgage being dated 1st October 1906), and defendant 3 is a subsequent mortgagee from the mortgagors under a document dated 12th February 1921. The plaintiffs obtained a preliminary decree on the mortgage of 1906 in O. S. No. 302 of 1919 on the file of the District Munsif of Razole. They

(14) A. I. R. 1927 Mad. 435=99 I.O. 6 55.

subsequently discovered that a mistake was made in the mortgage deed in mentioning the correct survey number of the property mortgaged. Instead of mentioning the correct survey number—168—the mortgage document mentioned the mortgaged property as Survey No. 166, in Munganda village. The plaintiffs applied to the District Munsif, after the preliminary decree was passed in O. S. No. 302 of 1919, to have the mistake corrected. The District Munsif was of opinion that the question whether there was or was not, a mistake in respect of the survey number in the mortgage-deed could not be gone into except in a fresh suit.

The present suit was accordingly instituted by the plaintiffs—the mortgagees—in the very same District Munsif's Court against defendants 1 and 2 who represent the mortgagors and defendant 3, the subsequent mortgagee from defendants 1 and 2. The first prayer in the plaint was to have the mortgage bond dated 1st October 1906 amended by substituting Survey No. 168 in the place of No. 166,—the property really intended and agreed to be mortgaged being Survey No. 168. Plaintiffs also prayed that the decree in O. S. No. 302 of 1919 mentioned above, should be amended suitably by substituting the correct survey number. Defendant 3 pleaded that he was a bona fide mortgagee from defendants 1 and 2 subsequent to the mortgage of 1906, whereas defendants 1 and 2 seem to have contended that there was no mistake at all in respect of the survey number. The lower Courts have found against the contentions of the defendants. The finding is that there was a mutual mistake between the parties in mentioning the survey number in the mortgage-deed and that it was Survey No. 168 that was really intended and agreed to be included in the mortgage document. In fact, as the lower appellate Court remarks the mortgagors had no land bearing Survey No. 166 in that particular village. That is a finding of fact, and we are bound by it in second appeal. The trial Court also found that defendant 3 was not a bona fide subsequent mortgagee. That would seem to be the finding of the lower appellate Court also. That finding also is binding upon us. On these findings, the second appeal preferred by defendant 1 to this Court was

dismissed by Waller, J. It was argued before the learned Judge that a suit would not lie to correct a mistake in a decree passed by a Court. The learned Judge overruled that contention relying on *Bepin Krishna Ray v. Jogeshwar Ray* (1). The learned Judge also relied on a decision of this Court reported in *Venkatarama Ayyar v. Elumalai Naicker* (2). Defendant 1 has preferred this Letters Patent appeal against the decision of the learned Judge.

The first question that arises is whether a mortgage deed could be rectified, in respect of a mutual mistake, after a decree had been passed on the basis of that mortgage. The learned advocate for the appellant argued that after the decree was passed on such mortgage, the right to amend the mortgage deed came to an end. I am unable to agree with that contention. S. 31, Specific Relief Act, indicates the limits of the power of the Court to rectify an instrument when a mutual mistake is proved. The circumstance that a decree has been passed on such mortgage is not, in my opinion, by itself, a legal bar to such rectification being granted, when otherwise a case for rectification is made out. In this respect I am inclined to follow the observations made by the learned Judges in *Bepin Krishna Ray v. Jogeshwar Ray* (1). At p. 273 (of 34 C. L. J.) the learned Judges state the point for decision as follows:

"Here the question of fundamental importance, stripped of all technicalities, is, whether the mutual mistake of the parties to the mortgage transaction manifested in the mortgage deed, which has extended into judicial proceedings, automatically as it were, without mistake on the part of the Judge, is still capable of rectification."

They answer the question as follows:

"On principle, the answer should clearly be in the affirmative; for, as Neville, J., observed in *Thompson v. Hickman* (15), at p. 562, to grant relief by way of rectification where the error has crept into one document and refuse it where it is embodied in two, is inconsistent with equitable principles, for equity regards the substance rather than the form of a transaction. There is no substantial reason, for instance, why we should not hold that where the same mutual mistake has been repeated in each one of a claim of conveyances, under such circumstances as to entitle anyone of the purchasers to a reformation (reformation seems to be the term used in American text-books, whereas our Act uses the word "rectification") as against his immediate vendor, equity may work back through all, and

(15) [1907] 1 Ch. 550=76 L. J. Ch. 254=96 L. T. 454=23 T. L. R. 311.

entitle the last purchaser to a reformation against the original grantor."

So far I agree with the observations made by the learned Judges in the *Calcutta Law Journal* case. In the case before us, the proceedings have not gone beyond the stage of passing the decree; the case is not complicated by the existence of a purchaser in Court auction in execution of the decree, the purchaser having bought the property with the wrong survey number mentioned in the proclamation and sale certificate. I therefore overrule the contention of the learned advocate for the appellant that simply because a decree has been passed in this case, the Court's jurisdiction to rectify the mortgage-deed has ceased.

The second contention is really more difficult to deal with. The learned advocate for the appellant argued that no suit lies in India to rectify a decree passed by another competent Court on the allegation that there was mutual mistake in respect of the mortgage deed which was the subject-matter of suit in the prior litigation. Cases of mutual mistakes in respect of compromises, or compromise decrees subsequently passed on the basis of such compromises, on which the learned advocate for the plaintiffs-respondents relied, are, in my opinion, distinguishable. For, as observed by Jenkins, C. J., in *Kusodha Bhukta v. Braja Mohan Bhukta* (4), at p. 223:

"But that class of cases is governed by a principle that has no application here. It is well-settled that a contract of the parties is nonetheless a contract because there is superadded to it the command of a Judge. It still is a contract of the parties, and as the contract is capable of being rectified for an appropriate mistake, so, as the necessary consequence, is the decree which is merely a more formal expression given to that contract."

The case in *Huddersfield Banking Co. Ltd. v. Henry Lister & Son, Ltd.* (16), is an English authority on that point. But it does not, in my opinion, follow from the above that the decree of a competent Court is liable to be corrected in another litigation by an independent suit for the purpose, even though the said decree accurately expresses the Court's intention in passing it. No doubt, it has been held that when a prior decree was obtained by fraud, a subsequent suit would lie to have it declared that the said decree is null and void on that ground.

That stands upon quite a different footing, in my opinion. The point that has to be considered now is whether a fresh suit is maintainable to rectify an alleged mistake in the decree passed in a prior suit when the prior decree appropriately expresses the intention of the Court which passed it. No case was cited before us in which an English Court has held that such a suit would lie. Even if any English authority on that point be available, one would find it difficult to apply such a decision to a case governed by our Code of Civil Procedure. When once a decree between the parties has been passed by a Court of competent jurisdiction, the Code provides the various methods by which such a decree could be amended or reversed. The Privy Council in *K. Venkata Subbamma Rao v. V. Venkatarama Rao* (17) held that a decree passed by a competent Court is subject to alteration only in the modes prescribed by the Code: see *K. Venkata Subbamma Rao v. V. Venkatarama Rao* (17) at p. 10; see also *Sri Gopal v. Pirthi Singh* (18) at p. 437, *Somasundaram Chetti v. Subramaniam Chetti* (19). I may also refer to *Drew v. Willis* (20) where Lord Esher, M. R., observed as follows at p. 452:

"No Court has such a power of setting aside an order which has been properly made, unless it is given by statute."

The subsequent observations are also instructive and may be referred to. The difficulty therefore arises whether the particular prayer in the present plaint which asks that the decree in the prior suit might be suitably amended and rectified is such as could properly be granted in the present suit. Our attention was drawn to the case in *Jogeshwar Atha v. Ganga Bishnu Ghattack* (6) decided by Maclean, C. J., and Pargiter, J., as authority for the position that such a suit would lie, being one of a civil nature and not being expressly prohibited by any provision of law. The question arose in Calcutta subsequent to the decision in *Jogeshwar Atha v. Ganga Bishnu Ghattack* (6) and in *Kusodhaj Bhukta v. Brajan Mohan Bhukta* (4), Jenkins, C. J., and Holm-

(17) [1901] 24 Mad. 1=27 I. A. 197=7 Sar. 678 (P. C.).

(18) [1902] 24 All. 429=29 I. A. 118=8 Sar. 293 (P. C.).

(19) A. I. R. 1926 P. C. 136=99 I. C. 742.

(20) [1891] 1 Q. B. 450=60 L. J. Q. B. 264=64 L. T. 760=39 W. R. 310=55 J. P. 373.

(16) [1895] 2 Ch. 273=64 L. J. Ch. 523=72 L. T. 703=12 R. 331=43 W. R. 567.

wood, J., were not prepared to follow the decision in *Jogeshwar Atha v. Ganga Bishnu Ghattack* (6). Having regard to the scheme and provisions of the Code of Civil Procedure, I find it difficult to understand how a subsequent suit would lie to rectify the decree in a prior suit. The Patna High Court in *Mahindra Narain v. Mt. Lal Jhari Kuer*, A. I. R. 1931 Pat. 296 and *Janakudular Saran Misser v. Ambica Prasad Singh* (8) also had difficulty in holding that such a suit would lie: see also *Bhonda Singh v. Dowlat Ray* (5). Now, on examining the reasons given by the learned Judges in the case in *Bepin Krishna Ray v. Jogeshwar Ray* (1) I do not find that the arguments advanced in *Kusodhaj Bhukta v. Brajan Mohan Bhukta* (4) have been really refuted. If *Venkatarama Ayyar v. Elumalai Naicker* (2) be a decision on this question, of course we should ordinarily be bound to follow the same. But on this point, there is no real discussion by the learned Judges. The reason would seem to be that the decree complained against in second appeal in that case did not—from what appears from the printed papers—contain any direction regarding amendment of any prior decree. The decree in that case simply rectified the mistake in the mortgage document. That being so, the decision *Venkatarama Ayyar v. Elumalai Naicker* (2) is no real authority on this point. One should rather be very careful before laying down that, *prima facie*, fresh suits would lie to rectify decrees already passed between persons who were properly represented in the same when the prior decrees correctly expressed the intention of the Court.

It seems proper that rectification of a decree should ordinarily be done by the Court by which it was passed. What then, is the relief that should properly be granted in such cases, which, while working for justice, would also be in accordance with the procedure prescribed by our Code? It seems to me that the proper prayer to be asked in the second suit in such a case is to have the mortgage instrument rectified. The result of obtaining such a decree would be that the decree-holder in the prior suit would be in a position to ask the Court which passed the decree in the first suit to allow necessary amendments to be made in the plaint and in the decree passed therein.

Courts would always be anxious to give effect to the decision passed between the parties relevant to the matter before them. If after obtaining a decree in the later suit, the decree-holder should make a request to the Court which passed the decree in the mortgage suit to have the necessary corrections carried out, it goes without saying that the Courts would in ordinary cases allow its records to be rectified accordingly. There are cases which show that a decree-holder could be prevented by an injunction issued in a subsequent suit, from executing the prior decree; and Courts would give effect to such subsequent decree and refuse execution of the prior decree. By analogy, we may also refer to cases where decrees and other proceedings passed by Court have been, by later decisions, declared to be not binding upon some or all of the parties to the same. When such a decision is passed between the parties in a later proceeding, then, as the Privy Council has pointed out, when the Courts which passed the prior decree or proceedings are approached to give effect to the later decision, they would always endeavour to give effect to such later decision passed between the parties and do the needful. I may refer to *Ganesh Rao v. Tuljaram Rao* (9) at p. 304.

The question therefore is reduced to a simple matter of procedure: whether the plaintiffs in this particular case could properly ask for the second relief, when the first relief would substantially be enough to safeguard their rights, and whether the second relief should be granted to them. But I am unable to agree with the contention of the learned advocate for the appellant that the present suit should be held to be not maintainable simply because the plaintiffs have also asked for the second relief by way of amendment of the previous decree. Here I should like to mention that so far as this High Court is concerned, it has always been anxious to have mistakes regarding boundaries and survey numbers of properties in suit, corrected, though such mistakes have crept in, not only in the plaint but also in decrees subsequently passed, on the basis of such plaints, whenever the same could be done without working injustice in any way. The cases are all referred to in *Appassa Rowthan v. Mohammad Rowthan* (14). There is therefore no real difficulty in practice,

since the plaintiffs by obtaining a decree in respect of the first prayer would ordinarily be able to have the corrections carried out in the prior decree and proceedings.

While agreeing with the appellant's learned advocate that the second prayer would really be unnecessary, and should not be granted in the view mentioned already, I do not however see any real reason for modifying the decree passed in the particular case before us. As I already remarked, after obtaining such a decree, it would be open to the plaintiffs to ask the Court in which prior proceedings took place to have the necessary amendments made. Here the two Courts are the same, and with that advantage, the Court by its decree in the present suit directed the necessary rectifications to be made both in the mortgage-deed and in the decree and proceedings in the prior suit. That portion of the decree has been confirmed by the lower appellate Court also. In these circumstances, the objection is not a substantial one, but rather a technical one; and further I do not think that the appellant has in any way been materially prejudiced by reason of the same. The merits have been found against the appellant by both the lower Courts. On the whole, having regard to all the circumstances of this case, no sufficient grounds have been made out for our interference in Letters Patent Appeal.

On the question whether a second suit on the basis of the amended mortgage document is the only—or, appropriate—remedy open to the plaintiffs, it is not necessary for me to say anything in the present case. The mortgage before us comprises other items also; so does the decree in the prior suit; and there is further no question of limitation.

For these reasons, I agree that this Letters Patent Appeal should be dismissed with costs.

P.R.S./K.N. *Appeal dismissed.*

A. I. R. 1932 Madras 283

CURGENVEN, J.

Sinna Pillai and others—Judgment-debtors—Appellants.

v.

Karuppatti Alla—Decree-holder—Respondent.

Appeal No. 175 of 1929, Decided on 14th October 1931, against order of Sub-Judge, Dindigul, D/- 15th April 1929.

Civil P. C. (1908), O. 21, Rr. 46 and 95—**Usufructuary mortgage debt is moveable property and as such attachable under O. 21, R. 46—Purchaser of such debt in execution is entitled only to sale certificate—Executing Court should not adjudicate on question of subsistence of such debt.**

An usufructuary mortgage debt is moveable property and is attachable as such under R. 46, O. 21. Upon sale the method of delivery is, as provided for in R. 79 (3) by a prohibitory order of the Court resembling that made on an attachment. It is only upon the sale of immovable property that delivery of possession of that property can be ordered, under R. 95. The purchaser of a usufructuary mortgage debt, whether or not he be also decree-holder cannot get anything more from the executing Court than his sale certificate. Hence no occasion can arise for that Court to adjudicate upon the question of the subsistence of the debt. It should leave the whole question of proof and enforcement of the debt to other proceedings: (*Case law discussed.*)

[P 284 C 2]

S. Nagaraja Aiyar—for Appellant.

T. P. Gopalakrishna Aiyar—for Respondent.

Judgment.—The appellant is the widow of one Musaku Rowthen, against whom the respondent obtained a money decree in 1919. The judgment-debtor died in 1920, and the appellant was brought on as his legal representative. In 1922 the decree-holder attached an othi or usufructuary mortgage interest which had been held by the judgment-debtor upon a property the equity of redemption of which had been sold by the mortgagor to the appellant in 1906; so that, at the time of the attachment, both the mortgage interest (if it still subsisted) and the equity of redemption vested in the appellant. The attachment, it is contended on the authority of *Ramaswami Moopun v. Srinivasa Iyengar* (1), should have been made, as of a debt, under O. 21, R. 46, Civil P. C., but in point of fact it was made, as of immovable property under R. 54 of that order. This error of procedure does not however, I think, affect the position. The othi interest was brought to sale and was purchased by the decree-holder. He then filed an application for delivery of possession to him of the mortgaged property. The District Munsif framed two issues, the first inquiring whether the othi debt had been discharged before attachment, and the second whether the purchaser was not entitled to delivery. He found that the debt had been discharged and he therefore refused to give delivery. The Subordi-

(1) [1916] 39 Mad. 389=28 I. C. 284.

nate Judge differed on the former point, and allowed the application. It is from this order that the appeal is preferred.

The sale certificate shows that what was sold was the "usufructuary mortgage debt." The first point taken for the appellant is that the executing Court cannot inquire into the truth of the debt, or its subsistence at the time of the attachment, but sells it for what it may be worth and leaves the purchaser to pursue his remedy else where. This, I think, is a correct statement of the position when the purchaser of the debt is a third party. I had occasion to decide the point recently in the case of a simple debt in C. R. P. No. 207 of 1931, and held, following *Ma Saw Yin v. Hooper* (2) and *Maharaja of Benares v. Patraj Kunwar* (3), that it is not for the executing Court to determine whether the debt is actually due or not. Lakshmana Rao, J., has taken a similar view in C. M. S. A. No. 89 of 1927. I do not think that the position is altered by the debt being secured by a mortgage, usufructuary or otherwise, but it is urged that it does not make a difference that the purchaser is the decree-holder himself. It is no doubt true that the executing Court has power under Ss. 47 and 50 of the Code to ascertain by inquiry the extent of the property of a deceased judgment debtor which has come into the hands of his legal representative; and if further authority were needed for this position it is to be found in such cases as *Arundadhi v. Natesha* (4), *Kuriyali v. Mayan* (5), *Vengappayan v. K. Parvati* (6), and *Punchanun v. Rabia Bibi* (7). But to apply this principle to the circumstances of the present case it is needful to inquire what useful purpose would be served by such an inquiry, and this involves an answer to the second question: whether the executing Court can, upon the strength of his sale certificate, put the purchaser in possession of the property.

I do not think that the decree-holder, *qua* purchaser, occupies any more favourable position than a third party auction purchaser. We have to look in each case to the nature of the property purchased,

and the facilities which the execution provisions of the Code afford him for realizing the proceeds of that purchase. The purchase was of a usufructuary mortgage debt, and such a debt it has been held,—see the decision of Phillips, J., in *Venkatalakshmi Ammal v. Mathurbutham Iyer* (8)—is moveable property and is attachable as such under R. 46, O. 21. Upon sale the method of delivery is, as provided for in R. 79 (3), by a prohibitory order of the Court resembling that made on attachment. It is only upon the sale of immovable property that delivery of possession of that property can be ordered, under R. 95. I have been shown no authority for the view that the purchaser of a usufructuary mortgage right buys such an interest in immovable property as would entitle the executing Court to proceed under this rule. Although, as has been said, the attachment was actually made under R. 54, it has not been suggested that that circumstance can invest the sale with a character and consequences which would be inapplicable to the kind of property which formed its subject-matter. I must hold accordingly that the purchaser of a usufructuary mortgage debt, whether or not he be also the decree-holder, cannot get anything more from the executing Court than his sale certificate. If that be so, it appears to me to follow that no occasion can arise for that Court to adjudicate upon the question of the subsistence of the debt, whatever power it may have in the case of a decree-holder auction-purchaser to do so. It should leave the whole question of proof and enforcement of the debt to other proceedings.

The result must be therefore that the appeal is allowed, the order of the lower appellate Court set aside and the order of the District Munsif restored with costs throughout.

P.R.S./B.V. *Appeal allowed.*

(8) [1929] M. W. N. 138.

A. I. R. 1932 Madras 284

CURGENVEN, J.

(*Pervela*) Ramakrishniah—Petitioner.

v.

(*Pandiri*) Satyanandan and others—
Opposite Parties.

Civil Revn. Petn. Nos. 777, 778, 915 and 916 of 1931, Decided on 7th November 1931, against orders of Court of Sub-Judge, Rajahmundry, D/- 19-3-1931.

(2) A. I. R. 1926 Rang. 175=97 I. C. 247=4 Rang. 100.

(3) [1906] 27 All. 262=(1905) A. W. N. 277.

(4) [1882] 5 Mad. 391.

(5) [1884] 7 Mad. 255.

(6) [1903] 26 Mad. 501.

(7) [1890] 17 Cal. 711 (F. B.).

Civil P. C. (1908), O. 11, R. 14 and O. 6, R. 4—Accounts between principal and agent settled wholly on agent's accounts—No accounts with principal—Particulars of misconduct should not be insisted upon from principal prior to inspection—Mere inability to particularize instances of fraud or error should be no ground for refusing application for inspection of accounts.

Where in a suit for recovery of money brought by a commission agent against his principal on the basis of settlement of accounts it appears that such settlement of account was based wholly on plaintiff's accounts, the defendants not having maintained any accounts and where therefore the specific evidence is exclusively in the hands of one party, it is not reasonable to insist upon the other party giving definite particulars of misconduct which an examination of that evidence alone would disclose. The very reason why inspection is needed is in order that the principal may be in a position to formulate his charges against the agent. The mere inability of a party to particularize instances of fraud or errors in his allegations does not afford a sufficient ground for refusing to grant him inspection. But where an application for inspection is made at a late stage of the proceedings, it may reasonably be refused if it prejudices the other party. (*Case law discussed.*) [P 285 C 2, P 286 C 2]

K. Subba Rao—for Petitioner.

G. Lakshmanan and G. Chandrasekhar Sastri—for Opposite Parties.

Judgment.—These petitions arise out of two suits, O. S. Nos. 56 and 58 of 1926, on the file of the Additional Subordinate Judge of Rajahmundry. The plaintiff in both suits are the same, being commission agents who also undertook to finance the operations of the merchants who employed them. The defendants are timber merchants who used to procure timber from the Agency Tracts and dispatch it to the plaintiff's for sale. In O. S. No. 58 there is a single defendant, who traded alone, and in O. S. 56, defendant 4 was his partner in dealings of this character. The plaintiffs claimed considerable sums of money as due to them on account, being the excess of advance made over the value of timber received. They pleaded in each case a settlement of account as having taken place in the year 1922, these settlements being followed by further dealings. The defendants disputed these settlements, although not in very unequivocal terms. Their case in fact was twofold, first that the so-called settlements were to be subject to further scrutiny, and secondly, that even if it be held that they were definite settlements of account they were vitiated by fraud. Issue 1 in each case inquired whether for the reasons stated in their written state-

ments the defendants were entitled to reopen these settlements of account. In order to obtain material upon this issue the petitioner, who is the sole defendant in the one suit and defendant 1 in the other, applied in the two suits for permission to inspect the plaintiffs' accounts relating to the presettlement period and then to cross-examine them upon the results of the inspection. When the applications came on for hearing both the petitioner and the pleader were absent, so that the Court had to come to an ex parte decision. It held that the petitioner had not qualified himself to make such a request because his allegations of fraud and misconduct against the plaintiffs were couched in general terms, and no specific instances were adduced. Since that was the sole ground upon which the petitions were dismissed, I propose first to consider whether the request should have been rejected for this reason.

It is common ground that the settlements were based wholly upon plaintiffs' accounts, the defendants not having maintained any accounts. It is accordingly urged before me that in such circumstances, where the specific evidence is exclusively in the hands of one party, it is not reasonable to insist upon the other party giving definite particulars of misconduct which an examination of that evidence alone would disclose. The very reason why inspection is needed, is in order that the principal may be in a position to formulate his charges against the agent. It is not therefore essential in every case to require specific allegations before making an order of the kind sought. I have not been shown any Indian law directly upon this point but I think that English decisions clearly show that this position is correct. The learned Additional Subordinate Judge, refers to only one English case, *Parkinson v. Hanbury* (1). What that case decided was that where a plaintiff seeks to open a settled account there must be in the bill a distinct statement of specific errors in the account. This is what Lord Westbury calls "the old rule, clearly enunciated by Lord Hardwicke," and he goes on to observe that having regard to the manner in which the evidence is taken in Courts of equity there would be no protection to a defendant if he had not by

(1) [1867] 2 H. L. 1=36 L. J. Ch. 292=16 L. T. 243=15 W. R. 642.

proper averments in the bill, distinct notice of the allegation that he had to meet. This objection, I think, may be got over, under our procedure, by requiring a party to file additional pleadings embodying the necessary particulars obtained from inspection; and having regard to later case law more precisely upon the topic now in question, I do not think that this case can be regarded as conclusively settling the law. If it did so settle it, clearly not only this application but the connected issue could not be entertained. In *Whyte v. Anrens* (2), a firm of merchants in London sued a firm carrying on business in Japan whom they had employed as agents to purchase Japanese goods and forward them to England, the allegation being that the defendants had purchased the goods at prices higher than the current prices and had secretly received commissions from the vendors and made profits in other ways. The charges were stated only in general terms, no particulars being mentioned. The defendants pleaded a settlement of account and the plaintiffs applied for a summons for discovery of documents in order to upset it. Bacon, V. C., in allowing the application referred to O. 19, R. 6, which corresponds to our O. 6, R. 4, but pointed out that the plaintiffs were unable to state particulars because all the papers relating to the transactions were in the possession of the defendants:

"They say they have not given evidence because they cannot, but if the defendants furnish them with the papers or books of accounts they will then give the particulars and show more distinctly the grounds on which they claim to be entitled to relief."

In the Court of appeal Cotton, L. J., agreed with the view taken by the learned Vice Chancellor but Fry, L. J., dissented, basing himself upon *Parkinson v. Hanbury* (1). He considered that the pleadings were not adequate for the trial of the particular issue and that the rule required a statement of

"a particular error or errors, or fraud or frauds, or suppression of moneys received; in fact a distinct allegation of the specific error."

The same question came before the Court of appeal in *Leitch v. Abbot* (3), where Chitty, J., had refused to make an order. The Court of appeal reversed the decision for the reasons given in the judgment of Cotton and Bowen, L. JJ.,

Fry, L. J., only remarking that the inclination of his opinion was in favour of the judgment of the Court below:

"There is here a general allegation of fraud." Cotton, L. J., observes, "and the plaintiff wants the discovery to enable him to prove his allegation. It may be that he will afterwards have to amend his pleadings, but to say that he must give details of the fraud in the first instance would be to reduce the right of discovery in cases of fraud to very narrow limits indeed."

Bowen, L. J., puts the matter cogently thus:

"Ought then, the generality of an allegation of fraud to be a bar to the right of discovery? It seems to me that the very fact that the pleader is unable to plead except in general terms, is in many cases the very reason why he should have discovery from the other party, so as to enable him to plead the fraud in detail."

Again in *Sachs v. Spielman* (4), where the defendants asked for further particulars of the transactions alleged in the plaint before putting in their statement of defence. North, J., after reviewing the previous cases based his decision upon similar considerations.

It appears to me that in the absence of any reasons for holding that the procedure should be different under our Code, these decisions ought to be followed, and that the correct view accordingly is that the mere inability of a party to particularize in his allegations does not afford a sufficient ground for refusing to grant him inspection. This as I have said was the only reason given for dismissing the applications and unless there be any other grounds for refusing them I think that they should be granted. The issue has been framed and the nature of the case is such that the defendant may well be unable to secure justice without inspecting the plaintiffs' accounts. I have been asked to refrain from interfering upon the ground that these are very old suits, dating from 1925, and that the defendants have been responsible for much of the delay that has occurred. This argument has not been supported however by explanations showing how the defendants, or which of them, were responsible. It is not contended that this application itself has led to delay and I cannot therefore find that this would be good ground for refusing it. A better argument is that the applications come at a late stage. The issues were framed in February 1926, and no satisfactory reason has been given why these appli-

(2) [1884] 26 Ch. D. 717.

(3) [1886] 31 Ch. D. 374=55 L. J. Ch. 460=54 L. T. 258=34 W. R. 506=50 J. P. 441.

(4) [1889] 37 Ch. D. 295=57 L. J. Ch. 658=58 L. T. 102=36 W. R. 498.

cations were not made as soon as the parties went to trial on the question of reopening the settlement. What I have to consider however is whether the plaintiffs are likely to be prejudiced by the order being made now. Plaintiff 1 is said to have died and plaintiff 2's examination has been proceeding for some time and has not yet been completed. This is the witness whom it is desired to cross-examine after inspection of the accounts and I have not been shown how such an inspection at the present stage would result in prejudice. The lateness of the application may better, I think, be dealt with by an order as to costs than by denying the defendant's facilities which they ought otherwise to enjoy. For these reasons I allow the petitions and direct the lower Court to grant the inspection applied for and thereafter to allow due opportunity for cross-examination. This order will however be contingent upon the petitioner paying the costs of the respondents of these applications in the lower Court and here unconditionally and before the inspection is permitted. After inspection and before the trial is resumed the defendant in O. S. No. 58 and defendant 1 in O. S. No. 56, who is the petitioner here, will file a statement specifying in detail the objections which he takes to the accounts the settlement of which in each case he desires to reopen.

P.R.S./K.N. *Petitions allowed.*

* * A. I. R. 1932 Madras 287

Full Bench

BEASLEY, C. J., RAMESAM AND
CORNISH, JJ.

Fatma Bi—Appellant.

v.

Nagoorkhan and another — Respondents.

Original Side Appeal No. 37 of 1931, Decided on 14th December 1931, against decision of Waller, J., D/- 28th January 1931.

* * (a) **Presidency Towns Insolvency Act (3 of 1909), S. 46 (3)**—Provable debts—Debt on which suit could have been filed at the time of adjudication of insolvency can be proved in insolvency.

Where the period of limitation expires on a holiday and the debtor is adjudged insolvent on the morning of the reopening day, the fact of the adjudication is sufficient to make it unnecessary for the creditor to file the suit, and the debt can be proved in the insolvency proceedings: *In re General Rolling Stock Co.*, (1872) 7 Ch. A. 646

and *Ex parte Lancaster Banking Corporation, In re Westby*, (1879) 10 Ch. D. 776, *Appr.*

[P 288 C 1, 2]

(b) **Limitation Act (1908), S. 4—S. 4 does not extend period of limitation—(Obiter).**

(Obiter):—Section 4 does not extend the period of limitation. It merely gives an extended time to the creditor in which to enforce his claim.

[P 289 C 1]

A. Ramachandra Ayyar—for Appellant.

K. Krishnaswami Iyengar for *V. Varadaraja Mudaliar*—for Respondents.

Beasley, C. J.—This is an appeal from a judgment of Waller, J., sitting in insolvency. The Official Assignee allowed the claim of the appellant here which was in respect of a debt alleged to be due to her on a promissory note by the insolvent. A creditor preferred an appeal from the order of the Official Assignee to Waller, J., and he allowed the appeal.

The facts can be briefly stated: The insolvent owed the appellant money on a promissory note. The last payment was a payment of interest on 20th October 1925. No further payment was made by the insolvent and the debt would have become and did become barred by limitation on 20th October 1928. Up to that time the appellant had taken no steps to enforce her claim against the insolvent on the promissory note. The 20th October, which was a Saturday, was a public holiday and the High Court was closed. The next day, the 21st, was a Sunday and the Court was closed that day also. On 22nd October the appellant could have filed a suit against the insolvent upon the promissory note and enforced her claim because by reason of the provisions of S. 4, Limitation Act, the insolvent could not successfully set up as bar to the suit the Limitation Act. S. 4, Limitation Act, is as follows:

"Where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court re-opens."

However on the morning of 22nd October 1928 the insolvent was adjudicated an insolvent and it is admitted that no steps were taken thereafter with regard to this claim by the appellant until she preferred her claim in the insolvency. Waller, J., held that, as the claim on the promissory note was barred on 20th October, and as the appellant had not filed a suit on 22nd October, the first available day after that, her claim was one which could not be

proved in the insolvency and accordingly allowed the appeal.

What we have got to consider here is what effect an adjudication in insolvency has upon S. 4, Limitation Act. It is argued by the respondent here that it has no effect at all, and that the appellant's claim was barred by limitation on 20th October, and she did not avail herself of the time given her for enforcing her claim against the insolvent on 22nd October. On behalf of the appellant it is argued that when the adjudication took place on 22nd October, no further steps could reasonably be taken by the appellant and that her claim was one to be dealt with in the insolvency. What has got to be considered is the meaning of S. 46 (3), Presidency Towns Insolvency Act. That section states that all debts to which the debtor is subject when he is adjudged an insolvent shall be deemed to be debts provable in insolvency. It is argued on behalf of the appellant that on 22nd October this was a debt to which the debtor was subject and that, being so, it was provable in insolvency. It seems to me that at any rate throughout 22nd October this was a debt to which the debtor was subject and the question as to whether or not it was provable cannot depend upon the action taken thereafter by the creditor. It is argued by the respondent that it was a conditional debt only, conditional on the appellant filing a suit against the debtor. In my view on that date the appellant had an enforceable claim against the debtor and the debtor had a debt which could be enforced against him. We have now got to consider whether it was necessary, the adjudication having supervened, for the creditor to file a suit. After the adjudication of a debtor all his property by reason of S. 17, Presidency Towns Insolvency Act, vests in the Official Assignee and no one can bring any suit to enforce any right against the property without the leave of the Court. It is argued here that, notwithstanding this vesting of the insolvent's property in the Official Assignee, the appellant should have come to Court on 22nd October after the adjudication of the insolvent and applied for leave to file a suit. That would have meant, of course, that he would have had to pay court-fee on his plaint and that, if on an examination of his claim, it appeared to the Official Assignee that the claim was a

good one, the filing of the suit would have been entirely unnecessary and would have cast upon the estate of the insolvent the burden of paying the costs of that plaint. A position somewhat similar, though the facts were slightly different, arose in *In re General Rolling Stock Co.* (1). In that case, which was a company winding up case, it is true, that it appears that the debt was not barred at the time of the making of the winding-up order but became time barred during the pendency of the liquidation. It was held there that the creditor had a good claim. On p. 649 James, L. J. says :

"After a winding-up order has been made, no action is to be brought by a creditor except by the special leave of the Court."

Here, after an adjudication no suit can be filed by a creditor against a debtor without the leave of the Court. Then he proceeded :

"And it cannot have been the intention of the legislature that special leave to bring an action should be given merely in order to get rid of the statute of limitations."

Here the obvious effect of filing a suit on 22nd October would have been to deprive the debtor of his plea that the suit was barred by limitation. That seems to me to be the same thing as filing a suit for the purpose of getting rid of the Limitation Act ; nor does it seem to me to make any difference at all that in that case there was at the time of the winding-up order a debt which was not barred by limitation. Here was an enforceable debt ; before it could be enforced the adjudication happened and it seems to me to be quite an unreasonable thing to force a creditor under such circumstances to apply for the leave of the Court to file a suit. Supposing the Court refused leave, then, although the Limitation Act gave the creditor the right to file a suit and enforce his claim on that day, that right would be taken away by the action of the Court. Another case to which reference can usefully be made is *Ex parte Lancaster Banking Corporation, In re Westby* (2). There Bacon, C. J., says :

"When a bankruptcy ensues, there is an end to the operation of that statute with reference to debtor and creditor. The debtor's rights are established and the creditor's rights are established in the bankruptcy, and the statute of limitations has no application at all to such a case, or to the principles by which it is governed."

It is perfectly clear that but for the intervention of the insolvency here, if the

(1) [1872] 7 Ch. A. 646.

(2) [1879] 10 Ch. D. 776.

creditor did not file the suit on 22nd October she could not enforce her claim. What I have said here must not be taken as meaning that S. 4, Lim. Act, extends the period of limitation. It does not; it merely gives an extended time to a creditor in which to enforce his claim under certain circumstances. For these reasons, the appeal must be allowed with costs (throughout) on the original suit scale.

Ramesam, J.—I agree.

Cornish, J.—I agree.

P.R.S./W.D.

Appeal allowed.

A. I. R. 1932 Madras 289

WALLER AND JACKSON, JJ.

(Tallapragada) Sadasivarayudu —
Plaintiff—Appellant.

v.

(Choppara) Venkataswami and others—
Defendants—Respondents.

Second Appeal No. 488 of 1927, Decided on 19th November 1931, against decree of Sub-Judge, Masulipatam, in Appeal Suit No. 67 of 1926.

(a) Madras Estates Land Act (1908), S. 3 (16)—Land granted on service tenure is excluded from operation of S. 3 (16) and thus occupancy right cannot be acquired in it by tenant of grantee.

A village which was granted on service tenure and at a favourable rate of rent is excluded from the category of raiyati land as defined in S. 3 (16), until the zamindar resumes the grant. Land which cannot be raiyati land as between the grantor and the service tenure-holder cannot become raiyati land as between the latter and his tenants. As the object of the Act is to prevent the holder of a service tenure from acquiring a right of occupancy against his grantor, it would be defeated by allowing his tenants to acquire such a right not merely against him, but also against his grantor. [P 289 C 2]

(b) Grant — Resumption — Tenant's rights against grantee come to end.

In the case of a resumable grant, any right a tenant may have acquired against the grantee, must come to an end on resumption by the grantor: 61 I. C. 537, applied in principle.

[P 290 C 1]

V. Govindarajachari and B. T. M. Raghavachari—*for Appellant.*

Ch. Raghava Rao *for Respondents.*

Judgment.—In the year 1839 a village called Atchampalem was granted by the Zamindar of Nuzvid to the ancestors of the first three defendants. They were to pay a kist of Rs. 34, a year and to maintain fifteen peons to watch the frontier bordering on the Nizam's territory. Defendants 5 and 6, were admitted as

tenants by the inamdars some time before 1913. In 1918 the zamindar resumed the grant as the service was not being performed and issued an ordinary raiyati patta to the first three defendants. In 1920, the plaintiff who was admittedly aware of the resumption, took a conveyance of their interest from defendants 5 and 6, and, as a result, claims to have a right of permanent occupancy in the suit village.

The lower appellate Court found that the grant was one made in lieu of wages and therefore resumable. It also found that the first three defendants were landholders within the meaning of the Estates Land Act and that the village was an estate, also within the meaning of that Act. These findings we see no reason to reject. Substantially the question for decision is whether defendants 5 and 6 acquired by virtue of the Act, a right of permanent occupancy in the village. It is beyond question that the village was granted on service tenure and at a favourable rate of rent. It was therefore excluded from the category of raiyati land as defined in S. 3 (16) of the Act, until the zamindar resumed the grant in 1918. It follows that the first three defendants could not acquire any right of permanent occupancy in it as against their grantor. The contention on behalf of the appellant is that his vendors could, under the Act, acquire such a right as against the grantees, who let them into possession—in other words, that land which cannot be raiyati land as between the grantor and the service tenure holder can become raiyati land as between the latter and his tenants. We can find no justification in the Act for such a contention. Land which is expressly excluded from the category of raiyati land for one purpose and is not expressly included in it for any other, can hardly be held to be raiyati land merely by implication. If the object of the Act is to prevent the holder of a service tenure from acquiring a right of occupancy against his grantor, it would be defeated by allowing his tenants to acquire such a right not merely against him, but also against his grantor. No authority has been cited which lays down anything of the sort, although some observations in *Veeraswami Mudali v. Palaniyappan* (1) are relied on. Assuming that that decision does lay down that

(1) A. I. R. 1924 Mad. 626=84 I. C. 799.

a tenant can acquire an occupancy right against the holder of a service tenure, it does not go to the length of saying that that right is effective as against the original grantor of the tenure. It seems obvious that, in the case of a resumable grant—like the present—any right a tenant may have acquired against the grantee, must come to an end on resumption by the grantor: see *Subramanya Ayyar v. Ponnappa Goundan* (2). That was, it is true, not a case under the Estates Land Act, but the principle would seem to apply here.

The appeal therefore fails. The appellant seeks to raise other questions, whether the grant was of the land or of the melwaram, and whether the land can be described as "old waste." These are new points, which we decline to consider at this stage. It is also argued that defendants 5 and 6 acquired an occupancy right by custom and outside the Act. That is a contention we agree with the lower appellate Court in rejecting. The appeal is dismissed with costs.

P.R.S./K.N. *Appeal dismissed.*

(2) [1920] 61 I. C. 597.

* * A. I. R. 1932 Madras 290 CURGENVEN, J.

(Pandyala) Subbarayudu—Petitioner.
v.

(Gudivada) Gopayya—Opposite Party.
Civil Revn. Petn. No. 1105 of 1931,
Decided on 27th October 1931, against
order of Dist. Judge, Guntur, D/- 16th
July 1931.

* * Criminal P. C. (1898), Ss. 195 (1) (b)
and (c)—Document filed in Court — Offence
of forgery committed with respect to docu-
ment after close of proceedings in which it
was filed but during its custody in Court —
Action cannot be taken under Criminal P. C.
(1898), S. 476.

Whether the offence be one mentioned in S. 195 (1) (b) or (c) it must appear to have been committed in or in relation to a proceeding before the Court that makes the complaint. The object of S. 476 and S. 195 is to give the Court, and not a private party power to make a complaint where the offence has entered as a component into some judicial proceeding. The offence need not have been committed before the Court and it may have been committed before the proceedings began. But it is indispensable that it must in some manner have affected those proceedings or been designed to affect them or come to light in the course of them. An offence committed after their close is wholly outside the scope of the provisions. Consequently where an offence of forgery is committed with respect to a document during the period of its custody in Court but

after the termination of the proceedings in which it was filed in Court, the fact that the document is still in the custody of the Court may impose upon the presiding officer, as the executive head of his establishment, certain responsibilities, but they are different in kind than those of a Court acting judicially and the inquiry which it may be his duty to make is not such as is contemplated in S. 476. Documents sometimes remain in the custody of a Court for a number of years and to relate them for this purpose to the proceedings in which they are filed would be to extend these requirements of the Code beyond reasonable limits.
[P 291 C 1, 2]

K. S. Jayarama Ayyar and M. S. Ramachandra Ayyar—for Petitioner.

Public Prosecutor and M. Srirama Murthi—for Opposite Party.

Judgment.—This petition is preferred against an order of the District Judge of Guntur directing under S. 476-B, Criminal P. C., that a complaint be made under Ss. 193 and 467, I. P. C., against the petitioner. The facts may be briefly stated as follows: The petitioner had executed a mortgage deed to the respondent for Rs. 8,000, and subsequently he filed a suit (O. S. No. 1136 of 1927) against third parties and applied for an interim injunction, in which application the respondent, under summons, produced the document in Court. The production was on 7th January 1928, and an order granting the injunction, and thus terminating the proceeding in which the mortgage bond was produced, was passed two days later, on the 9th, but the bond was not taken back from the Court's custody by the mortgagee. Then sometime later the respondent obtained a money decree against the petitioner in O. S. No. 164 of 1925, and proceeded to bring the mortgaged property to sale, subject to his own mortgage. The petitioner applied for a postponement of the sale, and in connexion with the application asserted that the respondent had not given him credit for a sum of Rs. 6,000 which he had paid towards discharge of the mortgage debt. This statement led to an examination of the document, which was still among the Court records, and it was found to bear an endorsement which the respondent denounced as a forgery which must have been committed after he produced the deed in Court on 7th January 1928. He accordingly applied to the District Munsif before whom the document had been produced for an order complaining of the alleged act of forgery. The application was dismissed, but on appeal

the learned District Judge has directed that a complaint should be filed under Ss. 193 and 467, I. P. C.

The question is whether the circumstances were such as to give the Court jurisdiction to complain under Ss. 476 and 195, Criminal P. C. It is necessary to observe in the first place, that the application was made in O. S. No. 1136 of 1927, and that that must be taken to be the "proceedings" for the purposes of these sections. As a matter of fact the document was not even produced in the execution proceedings in O. S. No. 164, so that so far as that proceeding is concerned no question of the applicability of S. 195 (1) (c), Criminal P. C., could arise. Nor I think as the District Munsif observes, could it be said, with reference to S. 195 (1) (b), that the offence was committed, "in or in relation to" that proceeding. The question accordingly is whether the complaint of the Court which disposed of the interlocutory application in O. S. No. 1136 was an act within its competence.

The power of the Court to make a complaint is derived from S. 476, Criminal P. C., and the offence must be one referred to in S. 195, sub-S. (1), Cl. (b) or Cl. (c) "which appears to have been committed in or in relation to a proceeding in that Court." This latter qualification is to be found also in Cl. (b), S. 195 (1), but not in Cl. (c). Its absence from Cl. (c) cannot however affect the jurisdiction conferred by S. 476, so that I conclude that whether the offence be one mentioned in Cl. (b) or Cl. (c), it must appear to have been committed in or in relation to a proceeding before the Court that makes the complaint. And this appears to be reasonable upon general considerations. Cl. (c), S. 195, if read without reference to the terms of S. 476, would debar a Court from taking cognizance of any offence of forgery committed by a party to a proceeding in respect of a document produced or given in evidence in that proceeding, whether or not the act of forgery bore any relation to the proceeding or not, and consequently whether or not the Court before which the proceeding took place had any opportunity or occasion to deal with the circumstances into which the act of forgery entered. I do not think that that can be the intention of the clause. The connection between the Act and the proceedings

must be something more than casual or accidental. The learned District Judge in the present case has indeed accepted the condition that the offence must appear to have been committed in or in relation to the proceeding. He holds that it is satisfied by the circumstance that the document, when the forgery was committed, was in the custody of the Court. Now as has been said, the document was filed in Court by the respondent on 7th January 1928, and two days later the proceedings in which it was filed came to an end. It is not known when the act was committed, but since it did not come to light until more than a year had elapsed it may be presumed to relate to the period of time after the proceeding had been disposed of. The question is whether an offence of this character, committed after the proceeding has terminated, but while the document is still among the Court records, can be said to have been committed "in or in relation to the proceeding." The expression is, no doubt, capable of a very wide construction, a good deal wider than the words as they stood before amendment, "committed before it or brought under its notice in the course of a judicial proceeding," application of which would certainly be decisive in the present case.

It is of course not open to argument that the offence was committed in the proceeding. Was it committed "in relation to" it? The answer must depend upon the intention with which that very general phrase may be presumed to have been used. The object of these provisions of the Code is to give the Court, and not a private party, power to make a complaint where the offence has entered as a component into some judicial proceeding. The offence need not have been committed before the Court, and it may have been committed before the proceedings began. But it seems to me indispensable that it must in some manner have affected those proceedings (see the heading of Ch. 35 of the Code) or been designed to affect them, or come to light in the course of them, and that an offence committed after their close is wholly outside the scope of the provisions. The mere fact that the document is still in the custody of the Court may impose upon the presiding officer, as the executive head of his establishment, certain responsibilities, but they are different in kind from those

of a Court acting judicially and I do not think that the inquiry which it may be his duty to make is such as is contemplated in S. 476. Documents sometimes remain in the custody of a Court for a number of years, and to relate them for this purpose to the proceeding in which they were filed would be, I think, to extend these requirements of the Code beyond reasonable limits. I am therefore led to the conclusion that there was no jurisdictional basis in this case for taking action under S. 476, Criminal P.C. I allow the petition, set aside the order of the District Judge and restore that of the District Munsif. The petitioner will have his costs in this Court.

P.R.S./P.N.

*Revision allowed.***A. I. R. 1932 Madras 292**

PANDALAI, J.

Chairman, Municipal Council, Palamcottah—Plaintiff—Petitioner.

v.

Thirumalaisami Mudaliar and others—Defendants—Opposite Parties.

Civil Revn. Petns. Nos. 895 and 896 to 910 of 1928, Decided on 26th October 1931, against judgment and decrees of Court of Dist. Munsif, Palamcottah, D/- 28th November 1927.

(a) Madras District Municipalities Act (1920), Sch. 4 R. 18—Place of employment of vakil's clerk is vakil's residence.

The principal place of employment of vakil's clerks is their master's residence where presumably the contract of employment was made and they receive their salaries and where also they have to do a considerable portion of their work every morning, preparing papers for presentation in Court and generally preparing for Court work and every evening winding up the day's work and getting things in order for the next day and attending to the correspondence and accounts. The fact that they have to be in attendance in Court to help their masters during Court hours and act according to orders then and there given does not alter the fact that the general control of their activities is by orders from the master and these orders in the case of all servants who have duties to be performed outside the master's house must in an ordinary and common-sense view be held to emanate from the master's residence. They can only be assessed by the Municipality where their principal's place of employment is, not by all Municipalities where their ordinary duties take them in ordinary course of business: *A. I. R. 1926 Mad. 1187, Foll.*

[P 293 C 1]

(b) Madras District Municipalities Act (1920), S. 93—Vakil's clerk does not exercise profession.

It would not be reasonable to say that a person who is holding an appointment, e. g., a vakil's clerk, is for the purpose of S. 93 exercising the profession of a clerk. The two

categories are distinct. There is ground for thinking that the persons intended by the first class are those who exercise their own profession and not clerks who work under those who exercise their profession, though in a literal sense it is possible to say that clerks are exercising the profession of clerks: *Lewis v. Graham*, (1883) 20 Q. B. D. 780, *Foll.* [P 293 C 2]

P. Venkatramana Rao—for Petitioner.

S. Ramaswami Ayyar—for Opposite Parties.

Judgment.—The petitioner in all these cases is the Chairman of the Palamcottah Municipality and the respondents are vakils' clerks living within that Municipality. The Municipality assessed them to profession tax under S. 93, District Municipalities Act 1920 for two years 1924-25 and 1925-26 at As. 8 per half year alleging that they were exercising a profession within the Municipality. The respondents refused to pay alleging that they were not exercising any profession but were only paid servants of the vakils who employed them and who were residing outside the Municipal limits at Veeraraghavapuram within the Tinnevely Municipality. The Municipality brought small cause suits for the recovery of Rs. 2 from each of the respondents. In the plaints the defendants were described as exercising a profession. During the hearing the Municipality seems to have put forward an alternative ground that the defendants are holding appointments in Palamcottah. It was admitted that the Court in which the vakils practise are situated in Palamcottah and that the defendants' clerks have duties to do in the Courts where their masters practise. But the defendants denied liability to be taxed on either ground. The facts as above stated are not in dispute. Neither side wanted any oral evidence to be recorded and so the District Munsif dealt with the case on what he calls preliminary points but what were really points arising on the admitted facts. He held firstly that the defendants are not exercising any profession but are merely paid servants or holders of appointments. Secondly, on the footing of their being holders of appointments, he held that according to R. 18, Sch. 4, as interpreted in *Municipal Council, Mangalore v. Parry & Co.* (1) the defendants could be assessed only at the principal place of their employment which he held to be the residences

(1) *A. I. R. 1926 Mad. 1187=98 I. C. 513.*

of the vakils i. e., Veeraraghavapuram. He accordingly dismissed the suits.

The learned Government Pleader who appeared for the petitioner first complained that the District Munsif had decided the cases without recording evidence. But the facts above stated were admitted and as neither side asked for any evidence to be recorded, the only questions that arose were those decided by the District Munsif.

It was next urged that on the footing of the defendants (respondents) being only holders of appointments, the construction placed on R. 18 that they could only be assessed at the principal place of employment is incorrect and that they could be assessed both by the Tinnevely Municipality where the vakils lived, and the clerks attend in the morning before going to Court and also by the Palamcottah Municipality where the vakils and their clerks work during the day in the Courts there. It was also urged that having regard to the nature of the duties of vakils' clerks their principal place of employment is where the Courts are situated and not where the vakils live. I am not prepared to say that the lower Court was wrong in holding that the principal place of employment of vakils' clerks is their masters' residence where presumably the contract of employment was made and they receive their salaries and where also they have to do a considerable portion of their work every morning, preparing papers for presentation in Court and generally preparing for Court work and every evening winding up the day's work and getting things in order for the next day and attending to correspondence and accounts. The fact that they have to be in attendance in Court to help their masters during Court hours and act according to orders then and there given does not alter the fact that the general control of their activities is by orders from the master and these orders in the case of all servants who have duties to be performed outside the master's house must in an ordinary and commonsense view be held to emanate from the master's residence.

Next the question whether the defendants could be assessed not only by the Municipality where their principal place of employment is but in all Municipalities where their duties take them in the

ordinary course is really set at rest by the decision in *Municipal Council, Mangalore v. Parry & Co.* (1). In that case which was one of exercising a profession which for the application of R. 18 stands on the same footing as holding an appointment it was held that Messrs. Parry & Co., whose principal office was in Madras but who had also a place of business in Mangalore could not be assessed to profession tax by the latter Municipality. That decision is binding on me and I must follow it and hold that the lower Court was right on this point. It is to be finally noted that this and similar questions arise only in the District Municipalities Act as it stood before the recent amendment by the Act of 1930. Under the amended Act, S. 93 and Sch. 4 have been extensively amended and the R. 17 corresponding to R. 18 of the old schedule contains no reference to the principal office or the place of employment.

The last contention for the petitioners was that the respondents were exercising a profession within the meaning of S. 93. Three groups of persons are contemplated in that section: (1) persons exercising a profession, art, trade or calling; (2) persons holding appointments; (3) persons in receipt of pensions and income. It would not be a reasonable construction to say that a person who is holding an appointment, e. g., a vakil's clerk is for the purpose of the section, exercising the profession of a clerk. The two categories are distinct. There is ground for thinking that persons intended by the first class are those who exercise their own profession and not clerks who work under those who exercise their profession, though in a literal sense it is possible to say that clerks are exercising the profession of clerks. The decision in *Lewis v. Graham* (2) is authority for the proposition that in a somewhat analogous context the expression carrying on business is to be understood as carrying on his own business and as excluding solicitor's clerks. Though that decision was on the question of jurisdiction to a Court, the collocation of ideas in the two contexts is sufficiently similar to apply the same reasoning. In my opinion, the District Munsif's opinion was right on this point.

The petitions are dismissed. As there was only one argument for both parties,

(2) [1888] 20 Q. B. D. 780.

the respondents will together get Rupees 100 for advocates fees in all the cases together and all the other costs if any.

P.R.S./K.N.

Petitions dismissed.

A. I. R. 1932 Madras 294

SUNDARAM CHETTY, J.

Ramnad Zamin Devasthanam Tahsildar and others—Petitioners.

v.

Kadarmeera Ambalam and others—Opposite Parties..

Criminal Revn. Cases Nos. 894 of 1931 and 13 of 1932 and Criminal Revn. Petns. Nos. 816 of 1931 and 13 of 1932, Decided on 19th January 1932.

Criminal P. C. (1898), S. 144 (4) and (5)—Duty of Magistrate—He should inquire into relative rights of parties before making ex parte order under S. 144 absolute.

An order in general terms prohibiting processions, secular or religious through the streets of a town, or taking part in such procession would be justifiable as an ex parte order which the Magistrate to pass in view of the urgency and on account of the necessity for an immediate prevention of any riot or breach of the peace. But the function of the Magistrate does not stop with the passing of the ex parte order, but it is his duty to give an early opportunity to any person or persons aggrieved by that order to appear and show cause against it, in order to see whether such order has to be rescinded, or altered. For such a purpose he has to consider whether the claims advanced by one or other of the parties or within or in excess of their legal and natural rights and whether any alterations or restrictions to the order already passed are reasonably necessary in order to obviate undue hardship to one or the other of the parties and to see that protection is given to the persons who act within the bounds of their legal and natural rights without being molested by the breakers of law, having at the same time due regard to the paramount necessity of preserving public tranquillity. A Magistrate acting under S. 144 need not usurp the functions of civil Court which alone is competent to finally decide the rights of parties. But for the purpose of passing a proper and reasonable order, he has to take into consideration the nature of the claims set up by the parties in order to see whether or not it is possible to afford protection to those who seek only the lawful exercise of any legal and natural rights. Further an absolute prohibition of all processions in all streets, secular and religious, without even fixing any time limit during day or night, is prima facie unreasonable and if such orders are passed repeatedly, without making any sort of inquiry as to the relative rights of the parties, it would be clutching at a more extensive jurisdiction by issuing a permanent injunction restraining the parties from taking processions for a pretty long time and such a course is an indirect evasion by the Magistracy of the law as laid down in S. 144. The authority of the Magistrate should be exerted in the defence of rights rather than in their suspension; in the repression of illegal, rather

than in interference with lawful acts. The fact that the civil Courts have not decided these questions cannot be made a pretext for shelving all consideration of those questions and brushing aside the evidence taken in respect of those rights as altogether beside the point. (*Case law followed*). [P 296 C 1, 2, P 297 C 1]

T. Rangachari, A. Srirangachari and U. Somasundaram—for Petitioners.

C. Brooke, Elliot, T. S. Venkatarama Iyer, T. R. Venkatarama Sastriar and T. P. Venkatarama Iyer—for Opposite Parties.

K. N. Ganapathy—for the Crown.

Order.—These two are connected revision petitions filed against the orders of the Second Class Magistrate, Mudukulathur, in M. C. Nos. 11 and 13 of 1931 on his file. In the exercise of the powers vested in him under S. 144, Criminal P. C., he passed an order on 12th October 1931, restraining both the Hindus and the Mahomedans of Kamudi (styled as A party and B party) from taking any kind of procession, secular or religious, through the streets of Kamudi town or taking any part in such a procession. On 22nd December 1931 he passed another order in similar terms, but making an exception in the case of bona fide marriage and funeral processions, as to which he put another restriction, namely, that licenses should be obtained in good time from the police under S. 30, Cl. 2, Police Act 5 of 1861.

Owing to the tension of feeling between the Mahomedans and the Hindus of Kamudi in the matter of taking processions both secular and religious, through the streets of this town, the Sub-Inspector of Police made a report on 14th June 1931, and thereupon, the Sub-Magistrate of Mudukulathur thought it necessary to pass an emergent ex parte order under S. 144, Criminal P. C., prohibiting any kind of processions through the streets of this town either by the Hindus or by the Mahomedans, as he apprehended a riot or breach of the peace. He passed this order on 15th June 1931, as an emergent measure, but however permitted the parties to appear with their witnesses and records before him on 19th June 1931, to show cause why this ex parte order should not be made absolute. In accordance with that direction, both parties filed statements in support of their respective claims, and the Nadar Hindus and non-Nadar Hindus of the A party and also the Mahomedans of

B party adduced some oral evidence before him. The Sub-Inspector of Police was also examined. The immediate cause of the dispute seems to be that the Hindus wanted to take their processions through the Mela Street (West Street) of Kamudi which is inhabited both by Mahomedans and Hindus, and this was objected to by the Moslems. The Hindus contend that according to immemorial usage they have a right to take their processions accompanied with music through the public streets of Kamudi including the West Street; whereas the Mahomedans contend that by reason of the beating of drums and other attendant music, the votaries in the mosque which is about 50 yards from the West Street, would be disturbed in their prayers, as also the women and the old and the infirm who have to worship in their houses in that street. After setting forth these contentions in his order, the Magistrate brushed aside the evidence adduced by the parties with the remark that it is beside the point as in his opinion he was not competent to give a finding as to the rights of the respective parties to pass through any street with processions. The only points which he thought he should take into consideration are the existence of strained relations between the Mahomedans and the Hindus in the matter of taking processions through the street in question and the likelihood of a serious breach of peace if an order under S. 144 is not passed. Holding that there were sufficient grounds for proceeding under S. 144 and also thinking that immediate prevention was necessary he made the original ex parte order absolute on 20th July 1931.

On 19th August 1931, a petition was put in by the Hindus to the Joint Magistrate, Ramnad, under S. 147, Criminal P. C., for causing an inquiry to be made as regards the matters in dispute and declaring the right of the Hindus to carry processions with music along the street in question in accordance with the long-established usage and prohibiting interference with the exercise of such natural rights. But this petition was dismissed by the Joint Magistrate on 2nd September 1931, stating that no action was necessary as the Sub-Magistrate reported that there was no likelihood of a breach of the peace. On 17th September 1931 the Joint Magistrate, in dealing with

the petition of Hindus, presented under Cl. 4, S. 144, Criminal P. C., against the orders of the Second Class Magistrate aforesaid, passed in M. C. No. 8 of 1931, upheld the view taken by the Second Class Magistrate in his order dated 20th July 1931 that it was not his province to deal with the question of the rights of the respective parties to take processions through public streets, and dismissed the petition. On 24th September 1931, one of the Muslims filed a petition praying for an order under S. 144, prohibiting the Nadar Hindus of Kamudi from taking their God in procession through the Mela Street known also as Mahomedan Street. In connexion with this petition, the Second Class Magistrate passed an order on 12th October 1931, preventing both parties from taking any kind of procession in Kamudi town through any of the streets. He declined to reconsider this order and dismissed the petition of the Hindus on 17th October. The Joint Magistrate, to whom a petition was put in under Cl. (4) of this section for rescinding or altering the order of the Second Class Magistrate dated 12th October declined to interfere. He seems to be of opinion that, in a proceeding under S. 144, any discussion as to the rights set up by the parties in the matter of carrying on processions in public streets would be irrelevant and a consideration of the same would not be the legitimate function of a Magistrate. This order was passed by him on 22nd November 1931. On the eve of the expiration of two months from 12th October 1931, the date of the order of the Second Class Magistrate under S. 144, the Sub-Inspector of Police again applied for an order under S. 144 prohibiting processions in Kamudi town and in connexion with that report a fresh order was passed by the Second Class Magistrate on 22nd December 1931, restraining both parties from taking processions in the street except bona fide marriage and funeral processions, for which license should be obtained from the police in due time.

It is now contended on behalf of the petitioners in these revision cases that the aforesaid orders of the Sub-Magistrate under S. 144 are illegal and ultra vires and that the learned Magistrate has taken an incorrect view of the scope of his functions under this section and misdirected himself in assuming that he had no

concern at all with the rights of the parties. It is further contended that such repeated ex parte orders passed in quick succession, at the same time refusing to hold any inquiry as to the rights set up by the parties practically operate as a permanent injunction restraining them from exercising the natural rights of citizens in public streets and are wholly illegal.

In view of the circumstances of this case set forth above, I should think that an order in such general terms would be justifiable as an ex parte order, which the Magistrate had to pass in view of the urgency and on account of the necessity for an immediate prevention of any riot or breach of the peace. But in view of the provisions of Cls. 4 and 5, S. 144, it can be stated that the function of the Magistrate does not stop with the passing of the ex parte order but it is his duty to give an early opportunity to any person or persons aggrieved by that order to appear and show cause against it, in order to see whether such order has to be rescinded, or altered. For such a purpose, he has to consider whether the claims advanced by one or other of the parties are within or in excess of their legal and natural rights and whether any alterations or restrictions to the order already passed are reasonably necessary in order to obviate undue hardship to one or the other of the parties and to see that protection is given to the persons who act within the bounds of their legal and natural rights without being molested by the breakers of law, having at the same time due regard to the paramount necessity of preserving public tranquillity. The observations of the learned Judges in the case reported in *Abdulla v. Lucky Narain* (1), as regards the scope of the Magistrate's functions under S. 518 of the Code, 1872 (which corresponds to the present S. 144) are pertinent to the present case. It is stated at p. 134 that, though this section enables a Magistrate in cases of emergency to make an immediate order for the purpose of preventing a breach of the peace, it is not intended to relieve him of the duty of making a proper inquiry into the circumstances which make it likely that such breach of the peace will occur. It is the duty of the Magistrate to hold an enquiry into the circumstances and determine whether, as a matter of fact, the

act prohibited as likely to lead to a breach of the peace is within or in excess of the legal right of the person forbidden to do it. The learned Judge then proceeds to say:

"If it is found that a man is doing that which he is legally entitled to do, and that his neighbour chooses to take offence thereat, and to create a disturbance in consequence, it is clear that the duty of the Magistrate is not to continue to deprive the first of the exercise of his legal right, but to restrain the second from illegally interfering with that exercise of legal rights."

These principles have been followed and applied in a case decided by the Patna High Court which is reported in *Blong v. Emperor* (2). In view of these authorities, and on a liberal construction of the provisions of Cls. 4 and 5, S. 144, Criminal P. C., I have to hold that the view taken by the Second Class Magistrate as also by the Joint Magistrate is too narrow, probably due to a misconception of the scope of the functions of a Magistrate under this section. It is not to be understood that a Magistrate acting under this section should usurp the functions of a civil Court which alone is competent to finally decide the rights of parties. But, for the purpose of passing a proper and reasonable order, he has to take into consideration the nature of the claims set up by the parties in order to see whether or not it is possible to afford protection to those who seek only the lawful exercise of any legal and natural rights.

An absolute prohibition of all processions in all streets, secular and religious, without even fixing any time limit during day or night, is prima facie unreasonable, and if such orders are passed repeatedly (in this case three times within the course of six months) without making any sort of enquiry as to the relative rights of the parties, it would be clutching at a more extensive jurisdiction by issuing a permanent injunction restraining the parties from taking processions for a pretty long time and such a course has been held to be an indirect evasion by the Magistracy of the law as laid down in S. 144: *vide Govinda Chetti v. Perumal Chetti* (3). In this case, the main dispute seems to have been in respect of the Western Street. But the order is a prohibition in respect of all the streets in the town. It is true that

(2) A. I. R. 1924 Pat. 767=82 I. C. 42=25 Cr. L. J. 1178.

(3) [1915] 38 Mad. 489=16 Cr. L. J. 629=30 I. C. 452.

(1) [1880] 5 Cal. 132.

persons, who assemble in a mosque or other religious institution for offering their prayers, should be protected from disturbance, and it is equally necessary that processions, religious or secular, should be allowed to be taken along the public streets in accordance with the immemorial custom or usage, but suitable restrictions should be placed in the exercise of such rights so as not to invade the rights of persons belonging to other religions in the performance of worship. The duties of a Magistrate, in dealing with situations like these, have been considered by the learned Judges of this Court in two important decisions reported in *Muthia Chetty v. Bapun Sahib* (4) and *Sundaram v. Queen* (5). These cases are very instructive as laying down the fundamental principles in a clear and lucid manner. Suffice it to refer to the following observations of Sir Charles Turner, C. J., at pp. 220 and 221 in the 6 *Madras* case.

"Where rights are threatened, the persons entitled to them should receive the fullest protection the law affords them and circumstances admit of. It needs no argument to prove that the authority of the Magistrate should be exerted in the defence of rights rather than in their suspension; in the repression of illegal rather than in interference with lawful acts. If the Magistrate is satisfied that the exercise of a right is likely to create a riot, he can hardly be ignorant of the persons from whom disturbance is to be apprehended, and it is his duty to take from them security to keep the peace."

The same view is expressed by Abdur Rahim, J., in the case reported in *In re Guruswamy Nadar* (6). In the two cases *In re Venkatasubba Reddi* (7) and *Venkatasubbayya v. Muhammad Falaiddin* (8), it has been held that orders under S. 144, Criminal P. C., should not be used as a means of depriving persons of their lawful rights which have been finally declared by competent civil Courts. But in the present case the matters in dispute between the parties do not seem to have been the subject of adjudication by any civil Court. The fact that the civil Courts have not decided these questions cannot be made a pretext for shelving all consideration of those questions and brushing aside the evidence taken in respect of these rights as altogether

beside the point. If the Magistrate had only a proper conception of the scope of his functions under S. 144, he would have tried to come to some conclusion as to the nature of the rights set up by the parties in order to see whether the ex parte orders passed by him need any amendments or alterations. If he had only paid some attention to the rights claimed by the parties and to the inconvenience or hardship caused to either party by a complete banning of the processions through all the streets without even fixing some particular hour or hours for carrying on such processions, there would have been a chance of the parties becoming satisfied. In the latest order passed by the Second Class Magistrate, the condition of obtaining licence from the police in due time is fixed even for funeral processions; but this may be a great hardship, as it would entail unreasonable delay in the removal of the corpse.

The order dated 12th October 1931, has now ceased to be operative and the order dated 22nd December 1931, will remain in force for about a month more. The cancellation of this later order by this Court would enable the parties at once to take their processions as they please, without any restrictions, and this may result in a breach of the peace which has to be avoided in any event. In this view, I do not propose to set aside the orders sought to be revised, but I would impress upon the Magistrate the necessity of his taking action even on his own motion under Cl. 4, S. 144, Criminal P. C. In adopting that procedure, he will have due regard to the observations made by me in this order on the strength of the authorities adverted to above, and either rescind or alter his order in a suitable way having regard to the legal and natural rights of the parties and the duty of the Magistracy and the police of protecting such rights and taking the appropriate steps against those who unlawfully interfere with the exercise of those rights and thus become law-breakers, having in view, of course, the prime necessity of adopting the best means for the preservation of peace. With these remarks, I dismiss both these petitions.

P.R.S./K.N.

Petitions dismissed.

(4) [1878] 2 Mad. 140=2 Weir 68.

(5) [1883] 6 Mad. 203=2 Weir 77 (F. B.).

(6) [1912] 13 Cr. L. J. 143=13 I. C. 831.

(7) A. I. R. 1927 Mad. 368=100 I. C. 709=28 Cr. L. J. 325.

(8) A. I. R. 1927 Mad. 611=101 I. C. 893=28 Cr. L. J. 509.

A. I. R. 1932 Madras 298

PANDALAI AND CURGENVEN, JJ.

(Bhagavatula) Krishna Rao—Plaintiff—Appellant.

v.

Mungara Sanyasi and others—Defendants—Respondents.

Second Appeal No. 146 of 1927, Decided on 12th November 1931, against decree of Dist. Judge, Vizagapatam, in A. S. No. 312 of 1923.

Evidence Act (1872), S. 116—Tenant cannot deny landlord's title even after expiry of tenancy so long as he does not surrender possession—Suit by *P* against *D* for recovery of possession dismissed by reason of previous suit—That suit was by *M* against *P*, *D* being added as subtenant—*P*'s pleas that he was owner and that he was in adverse possession found against him and suit decreed for possession—Finding in this suit are not res judicata between *P* and *D*—Decree in previous suit does not operate as eviction by paramount title so as to liberate *D* from estoppel against pleading *jus tertii*—Civil P. C. (1908), S. 11.

Where it is proved that the defendant is let into possession as tenant by the plaintiff, he will be estopped from pleading plaintiff's want of title at the time of the lease even after the expiry of the term of the tenancy so long as he has not surrendered possession. [P 299 C 2]

Suit by *P* for recovery of a certain house from *D* was dismissed on the preliminary ground that it was not maintainable by reason of a decree obtained in a previous suit. The previous suit was brought by *M* against *P*, and *D* was added as a subtenant of the house but remained ex parte. The suit was contested by *P* setting up that he was owner and also that he was in adverse possession for more than 12 years. Both the pleas were found against *P* and a decree for possession was passed. It was however allowed to become time barred. It was argued that the decree obtained by *M* operated as an eviction by title paramount and that *D* was thereby liberated from the estoppel against pleading *jus tertii*.

Held: that the findings in the previous suit were not as between *P* and *D* res judicata and the decree did not affect the legal relations inter se between parties who were co-defendants. The decree in the absence of anything amounting to a new arrangement between *M* and *D* or to an attornment could not operate as an eviction by title paramount: *A. I. R.* 1915 P. C. 96; *A. I. R.* 1927 P. C. 151 and 36 *Mad.* 53, *Rel. on.*; 4 *I. C.* 246, *not Foll.*; *A. I. R.* 1922 *Cal.* 237; *A. I. R.* 1926 *Mad.* 187; 27 *I. C.* 785; 17 *W. R.* 119; *A. I. R.* 1923 *Mad.* 88 and 9 *I. C.* 795, *Ref.*

[P 301 C 2]

P. Somasundaram—for Appellant.

Govindarajachari—for Respondents.

Pandalai, J.—The plaintiff's suit for recovery from the five defendants of whom two to five are minor sons of defendant 1 of a portion of a house alleged to have been let by plaintiff to defendant 1 in 1909 for which he alleges that that defen-

dant paid rent to him till 1915 has been dismissed by both the Courts below without taking evidence on these allegations though they were denied by the defendants on the preliminary ground that the suit is not maintainable by reason of the decree for possession of the suit house obtained in O. S. No. 12 of 1915 against the plaintiff and defendant 1 by the Putta family who established their title to the house but who allowed that decree to become time barred. The lower Courts took the view that the passing of that decree had the effect as between the parties to this suit of destroying whatever right the plaintiff may have previously had and of automatically putting an end to the tenancy pleaded by the plaintiff and that even if the plaintiff's allegations that he let the defendants into possession as tenants be true he would not be entitled to recover against them after that decree. The only question for determination is whether that view is correct.

Exhibit 1 is the judgment in O. S. No. 12 of 1915. Five members of the Putta family were plaintiffs, defendant 5 was another member who did not join as plaintiff and was therefore impleaded as defendant. The present plaintiff was defendant 2 and his mother since deceased was defendant 1. The present defendant 1 was defendant 4. He and defendant 3, another member of his family, were added as subtenants of a portion under defendants 1 and 2 to whom the plaintiffs alleged they had let the whole house. Defendants 3 and 4 remained ex parte. Defendants 1 and 2 contested the suit setting up that they were not tenants but owners and also that they were in adverse possession for more than 12 years. It was found that the plaintiffs were the owners, that though the tenancy alleged was not proved, the possession of defendants 1 and 2 which had begun before 1897 was only permissive at the beginning and that though it may have become hostile later, i. e., in 1904, as more than 12 years had not elapsed thereafter before the suit was brought the suit was in time. A decree for possession was accordingly passed in favour of the plaintiffs. That decree was never executed and has now become barred.

It is difficult to see how this decree merely as a decree could have any such effect as the lower Courts attributed to it as between the present parties who

were co-defendants in that suit. The finding as to title like every other finding in the case was one between the Putta family on one side and these parties both of whom were defendants on the other. As between the present parties the matters decided are certainly not *res judicata* and the respondents' advocate admits that this is so. In spite of that judgment and decree, it is certainly open to the plaintiff as against these defendants to prove that the findings in it as to title and permissive possession are wrong and even if they were right, to show that when this suit was brought he had acquired an unquestionable title by possession as owner for about 19 years. The statement of the District Judge that on the appellant's own pleadings he has no title on which he can sue, for the fact that the decree became barred cannot revive a title once lost, shows that he entirely misapprehended the effect of judgments *inter partes*. There is no question of reviving the appellant's title because it was never lost as between the present parties. If those facts are proved again in this suit they will only show that so early as 1904 the present plaintiff and his mother had asserted adverse possession as against the true owner and as the true owner never executed the decree obtained by him his remedy to get possession was lost as a natural consequence of which they perfected their title by enjoyment till 1923 when this suit was brought: *Ameerunnissa Begam v. Amir Khan* (1); *Singaravelu Mudaliar v. Chockalinga Mudaliar* (2) and *Valappil Ayissa v. Lakshmana Prabhu* (3).

Similarly the idea that by reason of that decree the tenancy granted by the plaintiff to defendant 1 became as between themselves automatically extinguished as the Munsif says and ended as the learned District Judge says is also based on the same erroneous idea that that decree did or indeed could affect the legal relations *inter se* between parties who were co-defendants.

According to S. 116, Evidence Act, and the decisions of the Privy Council on it *Bilas Kumar v. Desraj Ranjit Singh* (4),

(1) [1872] 17 W. R. 119=8 B. L. R. 540.

(2) A. I. R. 1923 Mad. 88=70 I. C. 994=46 Mad. 525.

(3) [1911] 9 I. C. 795.

(4) A. I. R. 1915 P. C. 96 = 80 I. C. 299 = 42 I. A. 202=37 All. 557 (P.C.).

Vertannes v. Robinson (5), at 440 (of 5 Rang.) if it is proved that defendant 1 was let into possession as tenant of the portion of the house sued for by the plaintiff, he will be estopped from pleading plaintiff's want of title at the time of the lease even after the expiry of the term so long as he has not surrendered possession. It was to meet this difficulty that the defendants put forward the decree in O. S. No. 12 of 1915 as having the effect of destroying the plaintiff's title and terminating the tenancy between plaintiff and defendant. That the decree did not destroy the plaintiff's title as between these parties has been explained. And mere termination of the tenancy by expiry of the term is no use to the defendants for as tenants they will still be bound by the same estoppel until they have surrendered possession. The defendants (respondents) have therefore cast about for other grounds for supporting the decision of the lower Courts.

Their learned advocate attempted first to argue that their plea was that the plaintiff has lost his title not by force of the decree as such but by withdrawal or termination of the license under which he was holding from the true owner. This is a question of fact which was never pleaded and in spite of the learned advocate's strenuous argument I am of opinion that it is an after thought. That is not the ground on which the plaintiff has been non-suited and if it were, evidence should have been taken on it. The advocate indeed asked us to reserve to him leave if the case is sent back to give evidence on the point. We have had the plaint and written statements translated and placed before us by the respondents' advocate. There is nothing in the written statement to show that the defendants pleaded that plaintiff's rights in the property were terminated or were transferred except by virtue of the decree. Indeed they could not have pleaded termination by the Putta people of their license or permission of which the only indication is the opinion of the District Munsif in Ex. 1 because according to that judgment itself that termination took place in or about 1904, five years prior to the tenancy now sued on. It is therefore plain that no such plea can be allowed to be taken now or hereafter.

(5) A. I. R. 1927 P. C. 151=102 I. C. 689=54 I. A. 276=5 Rang. 427 (P.C.).

The next argument is that the decree in O. S. No. 12 of 1915 operated as an eviction by title paramount that the defendant was thereby liberated from the estoppel against pleading *jus tertii*. Here again the pleadings have to be examined to see what the defendants pleaded. The only plea of any title derived by defendants from the Putta people is contained in para 5 of the written statement where it is said that the defendant has learnt from his father that the original owners of the suit property, namely the Putta people granted the same to him. This is a matter to be established by evidence to be given by the defendant which has not been done and therefore it is not available at this stage of the case whatever its effect may be even if proved. Then it is urged that the defendant has urged in para 4 that as the Putta people agreed not to disturb this defendant's father and that they were only intent upon ejecting the present plaintiff, this defendant's father did not contest the suit. This was not a plea of any facts amounting to eviction by title paramount but was only put forward as a reason for those defendants being *ex parte* in the former suit and this only means that the defendants being tenants in any case took no interest in the dispute about the title. Nowhere is it stated that the defendant became the tenant of Putta people or attorned to them or paid rent to them. Thus there is no other plea of eviction by title paramount unless the decree itself has that legal effect. The question is whether it has.

The lower Courts relied on *Bala Kushaba v. Abai Amirta Vaghmode* (6) and *Ram Chandra v. Pramath Nath* (7). The former case somewhat resembles the present one on the facts with the material difference that the tenant had after the decree for possession against himself and his lessor by a third party (Babajee) accepted a sale deed from that third party's heirs. Though this sale deed was held to be collusive and does not appear to have been the ground for holding that the tenants had been evicted by title paramount, that fact is sufficient to support the decision though not on the grounds stated. The learned Chief Justice at p. 1098 and Batchelor, J., at p. 1101 observe that the estoppel against the tenant under S. 116, expired on the

expiry of the term. This cannot be supported in view of the Privy Council decisions that it continues till possession is surrendered. He also took the view that the decree obtained by Babaji which as in this case was not executed had the effect of destroying the plaintiff (lessor's) title as between him and his tenant. In my opinion that view is too widely stated to be correct as between co-tenants to a decree obtained by a third party. Though the case was itself rightly decided on the facts it is not an authority for the appellant's proposition as to the effect of a decree for possession as an eviction by title paramount and the general observations are too widely expressed to be literally accepted. In the case in *Ram Chandra v. Prumudha Nath* (7) also the tenant had attorned to the true owner and in such a case it has been held that to constitute eviction by title paramount dispossession need not be by the tenant actually giving up possession to the third party but may be by attornment to him. In the passage at pp. 154 and 155 which deals with what amounts to an eviction by title paramount Richardson, J., after referring to the absence of Indian decisions first refers to early English decisions which establish the proposition that it is enough if the tenant on threat of eviction by the heir is obliged to attorn to him and that that amounts to an entry by him. He then refers to the other decisions that the bringing of an action of ejectment is equivalent to an entry. This sentence is relied on by the respondent. In view of the decisions of our own Court to be presently mentioned, I am reluctant to extend to decrees for possession made under the Indian practice and procedure the effect attributed in this respect to actions for ejectment according to the English practice.

Those who are curious to follow the development of the old English doctrine of livery of seisin which required "entry" and how gradually the requirement of livery of seisin and entry was dispensed with, will find the matter dealt with by Sir E. Pollock in *Pollock and Wright on Possession*, pp. 47 to 57. The learned writer deals at pp. 84 and 85 with the acts necessary to work change of possession or disseisin according to earlier authorities and points out that the action of ejectment in its modern form tried the right to possession by means of the

(6) [1909] 4 I. C. 246.

(7) A. I. R. 1922 Cal. 237=63 I. C. 754.

fiction that the nominal plaintiff having entered under a lease made by the real plaintiff was ousted by a mere stranger and the real defendant was brought in by a rule of Court upon the terms that he should "confess lease entry and ouster and insist upon his title only." When this form of action from its greater convenience became the general and accepted method of trying the title to the freehold as well as to chattel interests' disseisin or ouster ceased to be a principal fact. Having regard to these historical reasons which probably explain the fact of an action of ejectment as implying by fiction an ouster, it is not safe to apply it without qualification and regard to the reason of the thing to Indian law. The decisions of our own Court bearing on the question require something more than the obtaining of a decree by a third party to enable the tenant to plead that he has been evicted by a title paramount to his lessors. In *Devarajulu v. Mahamad Jaffar Saheb* (8), a dharmakarta who had leased temple property was at the suit of *B* held not to be, and *B* was held to be, the rightful office-holder. (The District Judge in this case makes a mistake when he says that the tenant was not a party to the suit. He was a defendant but remained ex parte; see p. 56).

In a subsequent suit brought by *A* (in which *B* was also added) to recover for himself the rent due for the period of the lease for which rent *A* had accounted to *B* in the previous suit, the tenant pleaded that *A* had no title to recover he having been found not to be the rightful dharmakarta. It was held that as the tenant had not surrendered the land to *A* or been evicted by *B*, or attorned to him or even notified *A* that he intended to hold under *B*, he continued to be under the estoppel laid down by S. 116, Evidence Act. Spencer, J., after citing text-books on the point, said that an unexecuted decree for possession would not amount to eviction. In *Alaga Pillai v. Ramaswami Thevan* (9), where a tenant being served by Government with a notice under S. 7, Madras Land Encroachment Act, had accepted a patta from Government and thereafter held under Government, it was held that the notice and acceptance of patta amounted in those circumstances to eviction and that actual

dispossession was not necessary. That case emphasises the requisites of constructive eviction and is of no use to the respondents: see also *Narain Rao v. Abbas Sahib* (10).

In my opinion the decree in O. S. No. 12 of 1915 in the absence of anything further done or alleged amounting to a new arrangement between Putta people and the defendant, or to an attornment, has not the effect attributed to it and the dismissal of the suit on that ground assuming that was the ground was wrong. The decree of the lower Court is reversed and the suit remanded to the District Munsif for trial on the merits on the other issues recorded. The respondents must pay the costs of the appellants in this and in the lower appellate Court. The costs hitherto incurred in the Munsif's Court will be provided for in the revised decree. The appellant will have refund of the fee paid in the memorandum of appeal.

Curgenven, J.—I agree.

P.R.S./P.N.

Suit remanded.

(10) [1915] 27 I. C. 785.

A. I. R. 1932 Madras 301

REILLY, J.

(*Unithali*) *Ramutti and another*—Petitioners.

v.

(*Kuttala*) *Padmanabha Chetti*—Opposite Party.

Civil Revn. Petn. No. 1709 of 1931, Decided on 2nd December 1931, to revise order of Sub. Judge, South Malabar, at Calicut, D/- 8th October 1931, and made in E. P. No. 586 of 1931.

Succession Act (1925), S. 214—Executor appointed by will for which probate need not be obtained must obtain succession certificate before obtaining decree for debt due to testator.

An executor appointed by a will, for which probate need not be obtained is not exempted from the requirement of S. 214 to produce a succession certificate before he can get a decree for a debt due to the testator's estate. The words of the section clearly include such an executor: *A. I. R. 1914 Mad. 51* and *A. I. R. 1926 Mad. 484 (F. B.), Ref.* [P 301 C 2]

P. Govinda Menon—for Petitioners.

Judgment.—I see no reason to hold that an executor appointed by a will, for which probate need not be obtained and has not been obtained, is exempted from the requirement of S. 214, Succession Act to produce a succession certificate before he can get a decree for a debt due to

(8) [1913] 36 Mad. 53=19 I. C. 555.

(9) A. I. R. 1926 Mad. 137=31 I. C. 1024.

the testator's estate. The words of the section appear to me clearly to include such an executor. It is contended by Mr. Govinda Menon that such an executor does not claim "on succession" within the meaning of the section. But not only would these words in their ordinary meaning include such a testator: Cl. b(1) of the section includes among persons "so claiming," i. e. on succession, executors who have obtained probate. The opinion of the Full Bench in *Ramiah v. Venkatasubbamma* (1), regarding the vesting of the testator's property in an executor by a will for which probate is unnecessary, does not affect this question; and it may be noticed that in that case the opinion of Wallis, C. J., in *Balkrishnadu v. Narayanaswamy Chetty* (2), that such an executor must obtain a succession certificate before he can get a decree for a debt is quoted with approval.

This petition is dismissed.

Time for obtaining the certificate is extended by two months from this date.

P.R.S./B.V. *Revision dismissed.*

(1) A. I. R. 1926 Mad. 434=94 I. C. 88=49 Mad. 261 (F.B.).

(2) A. I. R. 1914 Mad. 51=37 Mad. 175.

A. I. R. 1932 Madras 302

WALLER AND JACKSON, JJ.

Appathurai Chettiar — Plaintiff—Appellant.

v.

A. L. A. R. R. M. V. Vellayan Chettiar and another—Defendants—Respondents.

Second Appeals Nos. 643 and 644 of 1927, Decided on 16th November 1931, against decree of Dist. Judge, West Tanjore, in A. S. Nos. 223 and 232 of 1925.

Civil P. C. (1908), O. 21, R. 63—Suit under O. 21, R. 63—Plaintiff basing his claim on alienation—Burden of proving that alienation is valid lies on plaintiff—Burden of proof, rule as to, discussed.

Where in a suit under O. 21, R. 63, the plaintiff bases his claim on an alienation the burden of proving that the alienation is valid lies on the plaintiff. Of course, the defendant cannot escape the burden at some stage or other. If the plaintiff produces his deed, and swears that it is genuine and for full consideration and the defendant has nothing to say to the contrary, the plaintiff will succeed, and where the burden of the plaintiff is so light it is scarcely worth arguing whether it is more correct to say that the burden is originally upon the defendants, or upon the plaintiff. But where the defendant has something substantial to say to the contrary the real burden must inevitably fall upon the plaintiff to establish the right which he claims: *A. I. R. 1928 Mad. 1259; A. I. R. 1929 Pat. 579; A. I. R. 1931 Mad. 40; 30 I. C. 855; A. I. R. 1930 P. C.*

255 and *A. I. R. 1924 Mad. 770, Ref.; A. I. R. 1927 P. C. 237, Expl.* [P 303 C 2]

T. M. Krishnaswamy Ayyar and *K. V. Ramachandra Ayyar*—for Appellant.

K. V. Krishnaswamy Ayyar, V. Rajagopala Ayyar and *T. V. Ramiah*—for Respondents.

Judgment.—These appeals arise out of suits brought by a defeated claimant under O. 21, R. 63. The lower appellate Court has dismissed the suits and plaintiff appeals.

The sole point for determination is whether the learned District Judge was correct in casting the burden of proving the validity of the alienation under which he claimed upon the plaintiff. It is not a point of much practical importance in this case, or indeed in the generality of cases of this nature. Presumably an attaching defendant has been able to show good cause for impugning the alienation, else the claim would not have been defeated; then when the matter comes to a suit, it is largely a question of form whether the plaintiff begins by asserting the validity of his document, or the defendant by showing his proof of its invalidity. In the present case the defendant seems to be on strong ground, and if the lower appellate Court after finding that the transaction relied upon by the plaintiff was highly suspicious, that it was extremely doubtful if any portion of the consideration for the sale came out of the plaintiff's pocket, that the plaintiff was father of his vendors, and that at the time of the sale these vendors were heavily indebted, had concluded by definitely finding the transaction to be nominal, there would have been no occasion for this second appeal. By its use of the phrase "the natural inference ought to be that the transaction was a nominal one" and by its observation "the burden of proof lay heavily upon the plaintiff," the door has been opened for the argument that in law the burden lies upon the defendant. Even then there is not much ground for discussion. The Courts of India have uniformly held that in these cases the burden lies upon the plaintiff. The point is very clearly stated by Sir Lawrence Jenkins, C. J. in *Jamahar Kumari Bibi v. Askaran Boid* (1):

"The onus in this case is on Jamahar to show affirmatively that not only the ostensible but the real title also is in her. She is the plaintiff who is calling in question in a suit contemplated by

(1) [1915] 30 I. C. 855.

the Code an adverse decision of the Court given, it is true, in a summary proceeding, but conclusive, subject to the result of this suit. The plaintiff in the circumstances of this case cannot discharge the burden of proof cast on her by merely pointing to the innocent appearance of the instruments under which she claims: she must show that they are as good as they look. If specific authority for this is needed it is furnished by many cases among which are the decisions of Sir Richard Couch in *Roop Ram Dass v. Saseeram Nath* (2) and of Sir Charles Sargent in *Govind Atmaram v. Santai* (3)."

To these may be added a more recent case of our own Court in which a full discussion leads to the same conclusion. *Perayya v. Venkayamma* (4).

This would seem to be conclusive, but it is urged that the Privy Council ruling *V. E. A. R. M. Firm v. Maung Ba Kyin* (5) places the burden of proof upon the defendant. It is significant that in this case the burden of proof is nowhere mentioned. It is ruled that where there is a duly registered deed obviously the party claiming to attach that property for somebody else's debt must show that the sale was a fraudulent one, and

"that could only be done in this case (there is no other evidence) by showing utter inadequacy of consideration. So far as the Rs. 17,000 was concerned there was adequacy of consideration. Therefore there only remains the Rs. 3,000. Supposing that the payment of this Rs. 3,000 in hard cash was not established it is not enough to allow their Lordships to draw the conclusion that it was a fraudulent sale."

The ruling does not state when the defendant must undertake his obvious task of showing that the duly registered deed was fraudulent. If, following the usual practice, the plaintiff assumes the original burden, and puts in the registered deed, then, if the defendant has nothing at all to say against it the plaintiff would succeed. If however the defendant can then show utter inadequacy of consideration or some other circumstance suggesting a fraudulent sale, the plaintiff would in turn have to plead something more than the innocent appearance of the instrument; he must show that it is as good as it looks.

The Judicial Committee does not say that the burden of proof in the first instance lies upon the defendant and not upon the plaintiff, and the notion that it has said so is only derived from the head-note of the Rangoon ruling. The point

is cogently discussed in *Mahadeo Missier v. Ram Prashad* (6), and the same conclusion is reached on p. 898 that no proposition of law casting the onus upon the defendant is laid down in *V. E. A. R. M. Firm v. Maung Ba Kyin* (5) and this becomes abundantly clear by reference to *Muhammad Ali Mohammed Khan v. Mt. Bismillah Begam* (7), where the Privy Council casts the onus upon the plaintiff.

In *Govindaswami, In re*, A. I. R. 1928 Mad. 1259, Thiruvengkatachariar, J. also holds that the Rangoon ruling does not alter the law of onus in these cases, and in *Elayaperumal Thalaivar v. Vellai-kannu Thevar* (8), Sundaram Chetty, J. is inclined to the same view, though he thinks that where the claim has been dismissed without preliminary investigation the onus may lie upon the defendant. Of course, as observed in the beginning of this judgment, the defendant cannot escape the burden at some stage or other. If the plaintiff produces his deed, and swears that it is genuine and for full consideration, and the defendant has nothing to say to the contrary, the plaintiff will succeed, and where the burden of the plaintiff is so light it is scarcely worth arguing whether it is more correct to say that the burden is originally upon the defendants, or upon the plaintiff. But where the defendant has something substantial to say to the contrary the real burden must inevitably fall upon the plaintiff to establish the right which he claims. The lower appellate Court has committed no error and these appeals must be dismissed with costs.

P.R.S./B.V. Appeals dismissed.

(6) A. I. R. 1929 Pat. 579=119 I. C. 74=8 Pat. 890.

(7) A. I. R. 1930 P.C. 255=128 I.C. 647 (P.C.).

(8) A. I. R. 1931 Mad. 40=128 I. C. 453.

A. I. R. 1932 Madras 303

VENKATASUBBA RAO AND WALSH, JJ.
Mundakath Mathu—Defendant—Appellant.

v.

Chalora Illath Sankaran Nambudripad and others—Plaintiffs—Respondents.

Second Appeal No. 1927 of 1926 and Appeal No. 145 of 1928, Decided on 21st September 1931, against decree of Dist. Judge, North Malabar, in A. S. No. 138 of 1925.

Contract Act (1872), Ss. 64 and 65—Party seeking to avoid alienation (e. g. kanom) as invalid after utilizing consideration cannot

(2) [1875] 23 W. R. 141.

(3) [1888] 12 Bom. 270.

(4) A. I. R. 1924 Mad. 770=79 I. C. 899.

(5) A. I. R. 1927 P. C. 237=105 I. C. 788=5 Rang. 852.

keep both property and money—If alienation is to be declared not binding money must be restored back—Malabar law, Karnavan.

The principle on which Ss. 64 and 65 rest is not confined to cases expressly included in either of them and is that no man can at once treat the contract as avoided by him so as to resume the property which he parted with under it and at the same time keep the money or other advantages which he has obtained under it. The rule is applied as a rule of equity and good conscience.

Where money was borrowed by the karnavan of an illom by execution of a kanom to meet the expenses of the marriage of a female member of the illom and it was utilized for the purpose and subsequently a member of the illom who did not join in the execution of the kanom, although all the other adult members for the time being did, instituted a suit impeaching the alienation relying on a karar in the illom executed by all the members of the illom containing a clause that no debts shall be incurred except with the consent of all the adult members for the time being and that if any charges were created without the concurrence of all such members they shall not be valid.

Held: that as every member of the illom including the plaintiff had the benefit of the money the transaction would not be set aside unconditionally but only on the condition that the illom or its karnavan for the time being paid back the amount borrowed. If the payment was not made the suit was to stand dismissed and the kanom was to be binding on the whole illom: *Clough v. L. & N. W. R.*, (1871) 7 *Ex.* 26, *Foll.* A. I. R. 1926 *Mad.* 398, *Ref.* [P 305 C 1]

K. P. Ramakrishna Ayyar—for Appellant.

D. A. Krishna Variar—for Respondents.

Second Appeal No. 1927 of 1926.

Venkatasubba Rao, J.—The first question we have to decide is, whether this second appeal has been compromised as alleged by Vishnu Nambudri respondent 1. The suit relates to a Nambudri illom. Its karnavan was one Sankaran Nambudri, respondent 2. Vishnu, abovenamed, is the cousin of that Sankaran. Vishnu filed the suit out of which this second appeal arises, namely, O. S. No. 344 of 1923 on the file of the District Munsif's Court, Quilandy. That suit was filed on 5th July 1923. Vishnu, the plaintiff, impeached in that suit a certain alienation made by the karnavan Sankaran in favour of defendants 9 and 10. Defendant 9 is the appellant before us. The alienation took the form of a kanom dated 7th December 1922. The District Munsif dismissed the suit holding that the transaction was binding on the tarwad. His judgment was delivered on 17th December 1924. From that, an appeal was taken to the District Judge who set aside the Munsif's judgment on 16th March

1926. This second appeal was presented on 6th September 1926. (Here his Lordship here considered the question as to the factum of compromise and proceeded as follows:). We must therefore negative the contention that there was a compromise and allow the second appeal to proceed.

Coming then to the merits, the question that has to be decided is whether the alienation in favour of defendants 9 and 10 is binding on the tarwad or not. The kanom in their favour was executed on 7th December 1922, the consideration being Rs. 700. There is a concurrent finding that that amount was borrowed to meet the expenses of the marriage of one Devaki, a female member of the illom and that the sum was in fact utilized in connexion with the marriage expenses as well as the jewels and the dowry which of necessity had to be given. It is also found that the marriage of Devaki could not have been postponed and that there was thus justifiable necessity for the loan. But the District Judge who set aside the alienation relied upon a karar in this illom which had been executed in the year 1905. To that karar all the then members of the illom were parties including Sankaran, the present karnavan; he was at that time a junior member of the illom. That karar contains a clause, that no debts shall be incurred except with the consent of all the adult members for the time being and that if any charges are created without the concurrence of all such members, they shall not be valid. It is on this clause of the karar that the plaintiff relies. He did not join in executing the kanom in question though all the other adult members for the time being were parties to it. There was ill-feeling between him and the karnavan and he chose to live separately. There is a finding that the kanomdars took the kanom with notice of this restriction. The learned District Judge, following *Rama Vadhiyar v. Krishna Nayar* (1) has held that in such circumstances the kanom is not binding on the illom. The appellant's counsel says that he is prepared to argue that although Sankaran as a junior member was a party to the karar he ceased on his becoming a karnavan, to be bound by its provisions. It is unnecessary to deal with this argument for granting that the transaction as a kanom is not binding on

(1) A. I. R. 1926 *Mad.* 398=93 I. C. 20.

the illom the question is whether the alienees are not under S. 64, Contract Act, entitled to be restored to the sum they paid, for the appellant's learned counsel does not insist that the transaction should be upheld as a kanom but says that his client is content to have the relief under S. 64. In this case the money raised was utilized for the benefit of the illom; in other words, every member of that illom including the plaintiff had the benefit of that money. Granting that the karnavan acted in excess of his powers in borrowing the sum of which on the findings, every member had the benefit can the transaction be set aside unconditionally? The principle on which Ss. 64 and 65 rest is not confined to cases expressly included in either of them and is thus stated in *Clough v. L. & N. W. R.* (2) at p. 37:

"No man can at once treat the contract as avoided by him so as to resume the property which he parted with under it and at the same time keep the money or other advantages which he has obtained under it": see Pollock and Mulla's Contract Act Commentaries under S. 64.

This rule is applied as a rule of equity and good conscience. Even in *Rama Vadhiyar v. Krishna Nayar* (1) on which the District Judge relies there is a dictum recognizing this principle.

It is common ground that the property did not pass into the possession of defendants 9 and 10 in pursuance of the kanom. The result is that the kanom is set aside, on the condition that the illom or its karnavan for the time being shall pay defendants 9 and 10 in six months from this date Rs. 683 with interest thereon at 6 per cent per annum from 7th December 1924. If the payment is not so made the suit shall stand dismissed and there will be a declaration that the kanom is binding on the whole illom.

As regards the costs we make the following order. The appellant shall have her costs in the first Court and in the lower appellate Court but in this Court each side shall bear its own costs.

Appeal No. 145 of 1928.

The judgment which we have just delivered in S. A. No. 1927 of 1926 disposes of this appeal also. In accordance with that judgment the defence of the lower Court so far as it relates to the alienation the subject of charge Q is set aside. The court-fee paid on the memo-

randum of appeal shall be refunded to the appellant, otherwise we make no order as to costs.

P.R.S./R.M.

Order accordingly.

A. I. R. 1932 Madras 305

REILLY AND ANANTAKRISHNA
AYYAR, JJ.

Valiya Kalyani — Appellant.

v.

Krishnan Nambiar — Respondent.

Letters Patent Appeal No. 163 of 1927,
Decided on 27th October 1931.

(a) Registration Act (1908), S. 17—Agreement to renew lease though unregistered is admissible in evidence.

An agreement which does not operate as a present demise but is only an agreement to renew a lease is admissible in evidence though it is not registered. [P 306 C 2]

(b) Landlord and Tenant — Agreement with tenant to renew lease—Specific performance not barred—Subsequent lease to third person in the meantime—Latter lessee suing prior tenant for ejectment—Tenant can get suit stayed—His obtaining registered lease then is complete defence.

Although the tenant's possession by itself, though coupled with an agreement to renew, would not be a complete defence to a suit for possession by a person who has obtained a demise from the lessor of that tenant still where the right of the tenant to enforce specific performance of the agreement in his favour has not become barred by limitation it would be open to him to apply to the Court to have the suit for ejectment stayed and in the meantime he could file in his turn a suit for specific performance of the agreement and after having got a duly registered document he could file the same in the first suit and thus completely sustain the plea that the plaintiff is not entitled to the relief asked. Further since it is open to such a tenant to apply for the adjournment of the suit with a view to file a separate suit in his turn for specific performance and get a registered document, his position is certainly better when he has in fact obtained a registered document from his lessor in pursuance of the agreement for renewal after the demise in favour of the subsequent lessee and the absence of a registered deed in his favour when the lease in favour of subsequent lessee was executed would not be taken in the circumstances to stand against the rights of the tenant: 29 *Mad.* 336 and *A. I. R.* 1931 P. C. 79, *Ref.* [P 307 C 1]

(c) Mortgage — Kanam is combination of mortgage and lease — Specific Relief Act (1877), S. 27.

Kanam is a combination of both a mortgage and a lease and some of the recognized incidents of kanam cannot be explained but for the fact that it also partakes of the incidents of a lease. [P 307 C 2]

A document styled as a kanam kuzhikanam mortgage under which the person in whose favour it is executed has been expressly authorized to plant coconut trees etc., is not merely a mortgage but is a combination of a mortgage and a lease, and the rule that a suit for specific per-

(2) [1871] 7 Ex. 26=41 L. J. Ex. 17=25 L. T. 708=20 W. R. 189.

formance of an agreement to grant a loan would not ordinarily be decreed by Courts is not applicable to such transaction. [P 308 C 2]

(d) **Transfer of Property Act, S. 3—Notice—Constructive—English decisions must be carefully applied to cases in India—Application of doctrine of constructive notice to kanam transaction considered.**

The Court should be very careful about applying to India English decisions in regard to notice and it should do so only when it is quite sure that the circumstances are really similar. When it applies the principle of constructive notice that a man has notice because if he had made reasonable inquiries, he would have ascertained the facts and if he has not ascertained the facts he has been guilty of gross negligence, it must carefully regard all the circumstances of the case and of the country and of the people to whom it is going to apply that principle. Having regard to the fact that with reference to holdings under a kanam kuzhikanam and other similar demises the tenants do, as a matter of fact, expect renewals and renewals are granted in a very large majority of cases the doctrine of constructive notice of the rights of a lessee in possession by the subsequent purchaser of demised property is applicable. [P 309 C 2]

K. Sankara Menon—for Appellant.

O. T. G. Nambiar and *A. Achuthan Nambiar*—for Respondents.

Anantakrishna Ayyar, J. — Defendants 2 and 3 were holding certain properties under a janmi. On 28th January 1909 defendant 2 executed in favour of defendant 1 Ex. 1 called "kanam kuzhikanam mortgage" document under which defendant 1 was entitled to hold the properties till 28th January 1921. Subsequently defendant 2 received some renewal fee from the defendant 1 and executed on 19th December 1918, Ex. 3 in his (defendant 1's) favour. Defendant 2 seems to have subsequently changed his mind and executed in favour of the plaintiff a melcharth Ex. A, on 5th January 1919. After the expiry of the period covered by Ex. 1, the plaintiff on the basis of Ex. A instituted O. S. No. 419 of 1921 to redeem Ex. 1. Defendant 1 contested the suit, and relied on an agreement by defendant 2 to renew Ex. 1, and produced Ex. 3 to evidence the said agreement; he also pleaded that defendant 2 had as a matter of fact executed a renewal of the kanam kuzhikanam deed in his favour on 19th December 1920, Ex. 2. The plaintiff succeeded in the trial Court but on appeal the learned District Judge reversed the first Court's decree. He found that Ex. 3 was a genuine document and that the plaintiff must be taken to have had notice of the agreement entered into between defendant 1 and de-

fendant 2 with reference to the granting of the renewal by defendant 2 in favour of defendant 1. From the dismissal of the suit by the lower appellate Court the plaintiff preferred a second appeal to this Court and the learned Judge—Ramesam, J.—before whom the second appeal came on for hearing held that Ex. 3 should be taken to evidence only an agreement to renew and that the appellant's contention that it was a demise by itself should not be accepted. The learned Judge also found that the finding of the lower appellate Court on the question of notice on the part of the plaintiff of the agreement, Ex. 3, should be upheld. He also held that having regard to the fact that defendant 1 was in possession of the properties under a kanam kuzhikanam deed, and having regard to the agreement entered into between defendants 1 and 2, the plaintiff was bound to have inquired into the rights of defendant 1 in the circumstances and not having done so the plaintiff's melcharth document Ex. A should not be allowed to prevail over defendant 1's rights. In the result the learned Judge dismissed the second appeal. The present Letters Patent appeal has been filed by the plaintiff against that decision of the learned Judge.

Before noticing the arguments advanced by the learned advocate for the appellant I may say that I agree with the opinion of Ramesam, J. that:

Ex. 3 could not operate as a present demise and that it is admissible in evidence though unregistered and that the parties did not intend a demise until payment of the balance manusham of Rs. 5-1-3 by defendant 1."

It was first contended before us by the learned advocate on behalf of the plaintiff that having regard to certain decisions of this Court a lessee in the position of defendant 1 whose term had expired but who had an agreement of renewal in his favour could not for that reason withstand a suit for possession brought by a lessor or a purchaser from the lessor and it was argued that the decision of the learned Judge in this case is not correct. Our attention was drawn to the decisions reported in *Achuthan Nambudri v. Koman Nair* (1), *Gopalan Nair v. Kunhan Menon* (2) and *Kanna*

(1) [1903] 13 M. L. J. 217.

(2) [1907] 30 Mad. 300=17 M. L. J. 189.

Kurup v. Sankaravarma Rajah (3).

With reference to this argument it has to be observed that while the tenant's (defendant's) possession by itself, though coupled with an agreement to renew, would not be a complete defence to a suit for possession by a person in the position of the plaintiff in the circumstances, yet as was pointed out by one of the learned Judges in the Full Bench case in *K. Veerareddi v. K. Bapireddi* (4), where the right of the defendant to enforce specific performance of the agreement in his favour had not become barred by limitation, it would be open to him to apply to the Court to have the suit for ejectment stayed, and in the meantime he could file in his turn a suit for specific performance of the agreement, and after having got a duly registered document, he could file the same in the first suit and thus completely sustain the plea that the plaintiff is not entitled to the relief asked; see p. 351 (of 29 *Mad*). This view has been approved by their Lordships of the Privy Council in a recent case, *Ariff v. Jadunath Majumdar* (5). That being so, we have to see whether in the present case, if this question had been raised in its proper form before the trial Court, it would not have been open to defendant 1 to adopt the procedure suggested in the cases I have mentioned. At the time of filing the written statement—in fact even at the time of the delivery of the judgment by the trial Court—the right of defendant 1 to sue for specific performance had not become barred by limitation.

That being so, there is no real substance in the contention raised by the learned advocate for the appellant before us that defendant 1 had no manner of right to continue in possession. Further, if it is open to a person in the position of defendant 1 to apply for the adjournment of the suit with a view to file a separate suit in his turn for specific performance and get a registered document the position of defendant 1 in the present case is surely better, for defendant 1 has as a matter of fact obtained a registered deed Ex. 2, from defendant 2 in pursuance of the agreement, Ex. 3. That being so, the absence of a registered deed in favour of defendant 1 at the time of melcharth to

the plaintiff should not be taken, in the circumstances, to stand against the rights of defendant 1.

It was also suggested that after the grant of Ex. A in favour of the plaintiff by defendant 2 on 5th January 1919, the document, Ex. 2, which defendant 1 got from defendant 2 on 19th December 1920, should not be taken to have really conveyed the rights now in dispute to defendant 1. This technical plea was not raised in any of the lower Courts, nor was it raised before the learned Judge of this Court; nor do we find it specifically raised in the grounds of the Letters Patent appeal, either. In these circumstances, we think, that there is some force in the contention raised by the learned advocate for the respondent that such a matter should not be allowed to be raised for the first time here at this stage of the litigation. In the circumstances I do not think that we should allow this new point to be raised for the first time here. If it had been raised in proper form in the trial Court, it would have been open to defendant 1 to file a suit for specific performance against the plaintiff also to have a document similar to Ex. 2 executed by the plaintiff to defendant 1. I accordingly overrule the main contention raised by the learned advocate for the appellant.

The next point raised by him related to the finding on the question of notice. It was argued that defendant 1 was in possession only as a mortgagee, and that a kanam should be taken to be a mortgage and not a lease. It is too late in the day to raise such a contention. It has been held that a kanam is a combination of both a mortgage and a lease, and some of the recognized incidents of kanam could not be explained but for the fact that it also partakes of the incidents of a lease; for example, the question of the forfeiture of the term in case the kanamdar denies the title of the jenmi-demisor. However looking into the contents of the documents in question before us, Ex. 1, it is styled a "kanam kuzhikanam deed." Under it, express authority is conferred on defendant 1 to plant coconut trees, etc. To say that in those circumstances Ex. 1 evidences only a mortgage, and that the question of notice should be decided on that basis only, is, we think, not quite correct.

Then it was further argued that, even assuming that Ex. 1 is a combination of

(3) A. I. R. 1921 Mad. 243 = 62 I. C. 386 = 44 Mad. 344.

(4) [1905] 29 Mad. 336 = 16 M.L.J. 395 (F.B.).

(5) A. I. R. 1931 P. C. 79 = 131 I. C. 762 = 58 I. A. 91 = 58 Cal. 1285 (P. C.).

a mortgage and a lease, yet the inference sought to be drawn on behalf of defendant 1 from the possession of the land by defendant 1 is too far-fetched and that the principle of constructive notice should not be extended to such cases. We find that the doctrine of constructive notice of the rights of a person in possession has been discussed in several decisions that were quoted before us: *Daniels v. Davison* (6), *Faki Ibrahim v. Faki Gulam* (7), *Babasah v. Muhamed Akbar* (8), *Annalath Chathu v. Ven-gadan Pakker* (9), *Balchand Mahtor v. Bulaki Singh* (10). S. 27, Specific Relief Act, was also referred to. But it was argued that those were cases where the question arose as between the lessee in possession and a purchaser of the properties and it was contended that some of the learned Judges who had to consider this question expressed the opinion that the doctrine had probably been pressed too far.

But having regard to the incidents of the transaction evidenced by Ex. 1 and having regard to the fact that with reference to holdings under a kanam kuzhikanam and other similar demises, the tenants do, as a matter of fact, expect renewals, and renewals are granted in a very large majority of cases, we think that with reference to a case like the one before us it is not a case of extension of the doctrine referred to. I may note that the legislature has recently recognized the practice and conferred a legal right on the part of the kanam holders to a renewal of such demise on certain terms. Having regard to this usual practice, I think that the present is not a case of extension of the principle already recognized in several cases quoted before us. I may also refer to *Hunt v. Luck* (11) (at p. 433), and the decision of the Privy Council in *Barnhart v. Greenshields* (12), at pp. 32 and 33. The learned Judge who heard the second appeal thought that it was not a case of extension of the doctrine if he applied it to the kuzhikanam in question, and we are not satisfied that

any sufficient reasons have been shown as to why we should differ from that opinion. I accordingly overrule this contention also of the learned advocate for the appellant.

It was finally argued before us that a kanam is a mortgage and that specific performance of an agreement to grant a kanam should not be decreed by the Courts. There is however a recent decision of Krishnan Pandalai, J., reported in *Unniri Kutty v. Narayana Chettiar*, A.I.R. 1929 Mad. 777, where a substantially similar question arose for decision, and the learned Judge held that it cannot be said that the transaction of kanam well known in Malabar is in essence one of loan or mortgage. I agree with that decision of the learned Judge. In the case before us, we have got the specific conditions of the letting, namely, that defendant 1 should plant trees and otherwise enjoy the property. The argument that a suit for specific performance of an agreement to grant a loan would not ordinarily be decreed by Courts is, in our opinion, not applicable to a transaction similar to the one before us. I am therefore unable to agree with this contention of the appellant.

I would accordingly dismiss the Letters Patent appeal with costs.

Reilly, J.—I agree with my learned brother on all points. There are only three matters on which I should like to say a few words.

I agree with the decision of Krishnan Pandalai, J., in *Unniri Kutty v. Narayana Chettiar* that in proper cases there is no difficulty in making a decree for specific performance of an agreement to grant a kanam. And in this particular case, if there had been a suit for specific performance, there would have been no difficulty at all, as what defendant 1 would have been seeking would have been, not the grant of an original kanam, but merely a renewal of a kanam, which he already held and for which no further advance was to be made but on the contrary he was paying a considerable manusham. The principle, that no decree should be made for specific performance of a contract to advance or take a loan, in my opinion, does not apply to a case such as this.

I agree too that we should not, at this stage of the case, drive defendant 1 to a

(6) 16 Ves. 249

(7) A. I. R. 1921 Bom. 459=60 I. C. 986 = 45 Bom. 910.

(8) A.I.R. 1923 Mad. 563=73 I. C. 297.

(9) [1916] 34 I. C. 906.

(10) A. I. R. 1929 Pat. 284 = 117 I. C. 170 = 8 Pat. 316.

(11) [1902] 1 Ch. 428 = 71 L. J. Ch. 239 = 86 L.T. 68=1 S.E.C. (n.s.) 234=50 W. R. 291.

(12) [1855] 9 Moo. P. C. 18. (P.O).

suit for specific performance of the agreement embodied in Ex. 3. As my learned brother has pointed out, in 1920 he got a renewal of the kanam deed, Ex. 2, and that contains the very terms which would have been contained in any kanam deed which he could have got executed as a result of a suit for specific performance. It is true that Ex. 2 was executed by defendant 2, not by the plaintiff. But in a suit for specific performance the plaintiff would have been ordered to execute a similar kanam deed in his favour; and everything that the plaintiff could have properly urged in such a suit she was at liberty to urge and she did urge in this suit. I think there is no necessity at this late stage to require defendant 1 to sue for specific performance.

Ramesam, J., was of opinion that the plaintiff must be held to have had notice of the agreement, Ex. 3. It is not contended that she had actual notice. The finding is that she had constructive notice. Ramesam, J., arrived at that finding by applying the principle that a purchaser, who finds a tenant in possession of land which he buys, must be held to have had notice of the conditions under which that tenant is in possession. There are plenty of cases to that effect, both in England and in this country. Ramesam, J., has relied particularly on *Daniels v. Davison* (6) and upon *Barnhart v. Greenshields* (12) and a number of cases in this country in which *Daniels v. Davison* (6) has been followed. Now all those cases relate to the notice which must be imputed to a purchaser of land. *Daniels v. Davison* (6), as has been recognized frequently, carries that principle to great lengths. In that case the purchaser, who knew that there was a tenant in possession, was held to have had notice that the tenant had in his pocket an agreement from the vendor to sell the very property to him, a thing that one would hardly expect of a tenant. That case goes very far; and learned Judges in England have sometimes said that they would certainly not extend the doctrine of notice to a purchaser any further. But here we are dealing with something quite different. The question is whether the plaintiff, having obtained a lease from defendant 2, must be imputed with notice of an agreement to renew obtained by the prior lessee, whose term was still running. That seems to me very different from the case of a purchaser, who,

finding a tenant in possession, does not care to make inquiries about the tenant's rights. With very great respect I doubt whether the English cases quoted are of use to us in this particular matter; and, if I may say so, we should be very careful about applying to this country English decisions in regard to notice, and we should do so only when we are quite sure that the circumstances are really similar. When we apply the principle of constructive notice—that a man has notice because, if he had made reasonable inquiries, he would have ascertained the facts and, if he has not ascertained the facts, he has been guilty of gross negligence—we must carefully regard all the circumstances of the case and of the country and of the people to whom we are going to apply that principle.

I am not sure myself that one could say generally in this country that, if a man took a lease, the term of which was to start on the expiry of an existing term held by some other person, it was his duty as a reasonable man to inquire whether that other person had an agreement for renewal in his pocket and that he would be guilty of gross negligence if he failed to make an inquiry about that. But in this case we are dealing with Malabar, and we are dealing with the case of a person who takes a melkanam, the term of which is to begin after the expiry of the kanam still in force; in her own document the terms of the kanam in force are set out, and she knows that the kanamdar is in possession. Now can anyone who is acquainted with Malabar say that the melkanamdar has no reason to suppose that the kanamdar in possession is likely to be hoping for a renewal? Nobody could say that. Can anybody say that the melkanamdar as a reasonable person could be unaware that the sitting kanamdar may very well have approached the jenmi and have asked for a renewal and may very well have got an agreement for renewal already? I agree with my learned brother that, when we are dealing with Malabar we must remember Malabar conditions; and I have no doubt whatever that the melkanamdar, the plaintiff, if chose to make no inquiry whether defendant 1 had obtained an agreement for renewal, was merely choosing to shut her eyes, and having done that she cannot say that she had no notice. Therefore I agree, not on the strength of *Daniels v. Davi-*

son (6) or *Barnhart v. Greenshields* (12), or the other cases quoted by Ramesam, J., but on an application of the doctrine of constructive notice which appears to me to be appropriate to the conditions in the part of the country with which we are concerned in this case, that the plaintiff had notice of Ex. 3. I agree with my learned brother that this appeal should be dismissed with costs.

P.R.S./K.N. *Appeal dismissed.*

A. I. R. 1932 Madras 310 (1)

MADHAVAN NAIR, J.

Krishnavenamma — Plaintiff — Petitioner.

v.

Krishna Sastrulu and *another*—Defendants—Opposite Parties.

Civil Revn. Petn. No. 14 of 1929, Decided on 5th January 1932.

Madras Hindu Religious Endowments Act (2 of 1927), S. 69—Yeomiah allowance granted by Government to temple does not come under "income".

It is only from the income of the temple property that contribution may be levied under S. 69. Yeomiah allowance granted by the Government to a temple does not come within the meaning of the term "income" but being a fund paid by the Government for a specific purpose, i.e., for the deeparathanai and naivedyam expenses of a temple cannot be used for paying the amount claimed by the Religious Endowments Board under S. 69. [P 310 C 2]

K. Srinivasa Rao—for Petitioner.

V. Balaraman—for Opposite Parties.

Judgment.—This civil revision petition arises out of a suit instituted by the plaintiff who is a pujari of a temple for the recovery of deeparathanai and naivedyam expenses from out of the allowance which the temple obtains from the Government. The amount paid by the Government is Rs. 70. Rs. 17-7-0 out of the amount claimed by the plaintiff has been deposited in Court by the defendants-trustees. The question relates only to the liability to pay a sum of Rs. 52-9-0. The plea of the defendants is that this amount has been paid by them along with other amounts to meet the contribution levied by the Religious Endowments Board under S. 69, Religious Endowments Act and that they are not therefore liable to pay this amount to the plaintiff. They state that they had to pay this amount to the Board as the plaintiff who is in possession of the temple lands did not pay anything for meeting the demand made by the Board. Under S. 69, Religious Endowments Act, provision is made

for levying contribution from the income of a temple. It is only from the income of the temple property that contribution may be levied under this section. It is clear that yeomiah allowance granted by the Government to the temple cannot come within the meaning of the term "income". Evidence in the case makes it clear that this amount is paid by the Government for a specific purpose, i.e., for the deeparathanai and naivedyam expenses: see D. W. 1. If that is so, and this fact is not disputed, then I cannot understand how that fund can be used for paying the contribution claimed by the Board under S. 69. The respondents' learned advocate argues that the income of lands held by office-holders of the temple comes within the meaning of the term "income", and, as the petitioner holds lands belonging to the temple and has not made any contribution, he is entitled to use the yeomiah allowance for the purpose of meeting the demand under S. 69. I cannot accept this argument. What is strictly not an "income" of the temple cannot be touched by the trustee for the purpose of making the contribution under S. 69. If the lands held by the petitioner are liable for paying the contribution, the trustee should realize the amount from the lands, or leave the Board to realize it in whatever manner it thinks fit. In my opinion he can on no ground utilize the funds granted by the Government to the temple for a specific purpose, for meeting the claim under S. 69. In these circumstances I must set aside the order of the lower Court. The result is that the plaintiff will be entitled to recover from the temple the sum of Rs. 52-9-0. The decree of the lower Court is modified to this extent. In other respects the civil revision petition is dismissed. Each party will bear his or her own costs throughout.

P.R.S./R.M. *Order set aside.*

A. I. R. 1932 Madras 310 (2)

REILLY AND ANANTAKRISHNA
AYYAR, JJ.

Azhagaperumal Pillai — Defendant — Appellant.

v.

Rasa Pillai and *others*—Plaintiffs—Respondents.

Letters Patent Appeal No. 316 of 1926, Decided on 14th August 1931,

Adverse Possession—Break in—Decision of survey officer does not dispossess any party—Survey and Boundaries Act (1923).

Neither the decision of the survey officer nor the planting of stones in accordance with it in proceedings under the Act dispossesses any party; nor could it make any legal break in existing possession so as to render ineffective for purposes of limitation any adverse possession running at its date: (*Case law referred*). [P 311 C-1]

N. Sivaramakrishna Ayyar—for Appellant.

K. V. Ramachandra Iyer—for Respondents.

Judgment.—Mr. K. V. Ramachandra Iyer for the plaintiffs has supported the decision of the learned Judge by contending that in the proceedings under the Survey and Boundaries Act in 1923 there was a finding that plaintiff 2 was then in possession of the land. Plaintiff 2, in his petition to the survey authorities, alleged that his neighbour (apparently defendant 1 or defendant 6) had trespassed on the land. Defendants 1 and 6 contended that they and their predecessors had been in possession for 40 years. The Head Surveyor decided in favour of plaintiff 2 and marked out the land accordingly, but recorded no findings as to possession at the time of the proceedings. On appeal, the Sub-Assistant Director of Survey, after examining the settlement records, said:

"the contention of the appellants is not true and does not deserve any consideration,"

and dismissed the appeal. We cannot find that his decision rested on any finding that defendants 1 and 6 were not then in possession, or had not been in possession long enough for the purpose of defendant 7 in this suit, so definite as to operate as *res judicata* in this suit. Nor can we agree with the learned Judge that the decision of the survey officer could have effect to stop any possession adverse to the plaintiffs which might then be running in favour of defendants 1 and 6. Neither the decision of the survey officer nor the planting of stones in accordance with it in proceedings under the Act *ipso facto* dispossesses any party; nor could it make a legal break in existing possession so as to render ineffective for purposes of limitation any adverse possession running at its date. We do not agree with Mr. Ramachandra Ayyar that that is the effect of the opinion of the Full Bench in *Muthirulandi Poosari v. Sethuram Aiyar* (1). Our view on this point is supported by the opinion of Ramesam, J., in *Kuppu*.

swami Iyer v. Venkatasami (2), and that of Benson and Krishnaswami Ayyar, JJ. in S. A. No. 1102 of 1909. It would be very extraordinary if the survey officer's decision could have such a result—a result which would follow no decision of a civil Court that a party had or had not title: cf. *Subbayya Pandaram v. Mahomad Mustapha Maracayar* (3), and *Singaravelu Mudaliar v. Chockalinga Mudaliar* (4).

This appeal is allowed and the decree of the Subordinate Judge is restored with costs here and in second appeal.

P.R.S./K.N.

Appeal allowed.

(2) A. I. R. 1923 Mad. 29=70 I. C. 672.

(3) A. I. R. 1923 P. C. 175=74 I. C. 492=50 I. A. 295=46 Mad. 751 (P. C.).

(4) A. I. R. 1923 Mad. 88=70 I. C. 994=46 Mad. 525.

A. I. R. 1932 Madras 311

REILLY AND ANANTAKRISHNA
AYYAR, JJ.

(*Vadde*) *Venkataswami* and another—
Defendants—Appellants.

v.

(*Bommaraju*) *Venkatasubbayya* and
others—Plaintiffs—Respondents.

Second Appeals Nos. 717, 1541 and 1893
of 1925, Decided on 14th September 1931.

Registration Act (1908), S. 28—Particular item of property included in sale deed merely for getting deed registered in particular office of Sub-Registrar—Both vendor and vendee joining in fraud on Registration Department—No relief could be given to plaintiff bringing suit for recovery of certain items covered by sale deed on allegation that document was not validly registered and consequently not binding on him—Fraud.

As a general rule plaintiff cannot plead his own fraud or illegal act as a basis of his claim or as a necessary step towards the success of his claim. His position in the matter is not made better by showing that the defendant has joined him in the fraud or illegal act or by fraud or illegal act not being pleaded but coming to light in the course of the trial of the suit or even in the hearing of an appeal. There is no exception to the general rule even where the fraud or illegality disclosed is in contravention of some rule of public policy embodied in a statute. [P 313 C 1]

The parties included a particular item of property in a sale deed not belonging to the vendor and not intended by any of the parties to the deed to pass to the vendee simply with a view to get the deed registered in the particular office of a Sub-Registrar. Both the vendor and the vendee joined in the fraud. It was also found that the fraud was effected and the vendor got his money and the vendee was put in possession. A suit was brought for recovery of certain items of property covered by the sale deed on the allegation that the document was not validly registered and could be ignored.

(1) [1919] 42 Mad. 425=50 I. C. 43.

Held : that the plaintiff being himself a party to the fraud on the Registration Department could not be allowed to plead or take advantage of any illegality in the registration of the deed : 35 Cal. 551 (P. C.), *Rel. on.* ; A. I. R. 1914 P. C. 67 and A. I. R. 1921 P. C. 8, *Dist. (Other case law referred)*. [P 314 C 1]

R. Rajagopala Iyengar for *B. Somayya*—for Appellants.

V. S. Narasimhachari for *P. Venkata-ramana Rao* and *Y. Suryanarayana*—for Respondents.

Facts.—In this case the plaintiff sued for partition and recovery of a quarter of six items of property, which he alleged belonged to his maternal grandfather, Karavadi Ramaswami, who died in 1860. Ramaswami left a widow, Mahalakshamma, who lived until 1892, and three daughters, Rangamma, Kamakshamma, and Lakshamma. Lakshamma died before her mother Mahalakshamma. Rangamma lived until about 1910. Kamakshamma lived until 1919. The plaintiff and defendant 43 were the surviving sons of Rangamma. Defendant 41 was the surviving son of Lakshamma. The other defendants were alienees or representatives or transferees of alienees. The District Munsif who tried the suit made a decree that the plaintiff and his brother, defendant 43, were entitled to recover each one-fourth of two plots in item 1 in the suit included in the sale deed Ex. 1, on payment to the alienees defendants 2 to 10 of Rs. 750 and also that the plaintiff was entitled to one-fourth of item 5. The rest of the suit he dismissed. The plaintiff and defendants 2 to 4 appealed to the Subordinate Judge, who made a decree that the plaintiff was entitled to one-fourth of that part of item 1 much the greater part of it which was not included in Ex. 1, but dismissed the plaintiff's suit otherwise, so far as it was before him, including that part of it in which he had succeeded before the District Munsif in respect of a part of the property covered by Ex. 1. There was no appeal before the Subordinate Judge about item 5, and so the District Munsif's decree in respect of that item stands.

Against the Subordinate Judge's decree three second appeals have been preferred to this Court. In S. A. No. 1541 of 1925 the plaintiff appealed against the Subordinate Judge's decree so far as it was against him in respect of the land covered by the sale deed Ex. 1 and in res-

pect of item 2. Defendants 2 to 6, 9 and 10 appealed in S. A. No. 1893 of 1925 and defendants 11 and 12 in S. A. No. 717 of 1925 against the Subordinate Judge's decision in favour of the plaintiff in regard to that part of item 1 not included in the sale deed Ex. 1. (After return of findings, his Lordship delivered the following judgment).

Reilly, J.—It is not now disputed that all the property concerned in the suit, as has been found by the lower Courts, was the property of Karavadi Ramaswami at the time of his death in 1860 and that after his death Mahalakshamma had only a widow's interest in it. The sale deed Ex. 1, which I have mentioned, was dated 7th September 1908 and was executed by Rangamma and her three sons then living, the plaintiff, defendant 43 and an elder brother, Venkatapayya now dead. It was in favour of defendant 1, who is now represented by defendants 2 to 4 as his legal representatives and by other contesting defendants as transferees from him. Ex. 1 is a registered document ; but in it a small item of one cent is included which never belonged to the vendors and which it has been found was never intended by any of the parties to Ex. 1 to pass to the vendee. It was included only for the purpose of getting the document registered in a particular Sub-Registrar's Office, in which no sale deed relating to the other items, which were intended to be transferred, could have been registered. The plaintiff in his plaint pleads that the inclusion of item 4 in the document and getting the document so registered in an office where otherwise it could not have been registered was a fraud on the registration law and that therefore the document has not been validly registered and he can ignore it.

On the facts there is no doubt that that was a fraud against the Registration Act. The evidence is in effect that the plaintiff, his brother, defendant 43 and defendant 1, the vendee, all joined in that fraud. The District Munsif and the Subordinate Judge therefore found that Ex. 1 was not validly registered and had no legal effect. Before us a contention has been raised for the contesting defendants that the plaintiff cannot plead his own fraud in that way and that, even if this fraud had come to the notice of the Court otherwise, no relief could be given to the plaintiff in the suit on that basis but that

the maxim *in pari delicto potior est conditio defendentis et possidentis* should be applied. It cannot be denied that as a general rule a plaintiff cannot plead his own fraud or illegal act as a basis of his claim or as a necessary step towards the success of his claim. His position in that matter is not made better by showing that the defendant has joined him in the fraud or illegal act or by the fraud or illegal act not being pleaded but coming to light in the course of the trial of the suit or even in the hearing of an appeal. *Gascoigne v. Gascoigne* (1) and *Scott v. Brown* (2). In the latter case the plaintiffs sued on an illegal contract involving an indictable offence. The illegality was not pleaded, and, although the trial Judge noticed it he did not let it affect the disposal of the case before him. It was the Lords Justices in the Court of Appeal who themselves took the point. Smith, L. J., said :

"If a plaintiff cannot maintain his cause of action without showing, as part of such cause of action, that he has been guilty of illegality, then the Courts will not assist him in his cause of action."

and he applied the maxim *in pari delicto potior est conditio possidentis*. Lindley, L. J., said :

"It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him."

I do not think there can be any doubt about the general rule. But it has been suggested that there is an exception when the fraud or illegality disclosed is in contravention of some rule of public policy embodied in a statute and that, if that is so, the plaintiff may be allowed to vindicate the law and public policy to his own profit in spite of his own fraudulent or illegal act. So far as I understand the matter, there is no such exception. In *Cottington v. Fletcher* (3), the plaintiff was a Papist who owned an advowson, i. e., the right to present to a living in the Church of England. By a Statute, William and Mary, C. 26, no Papist can present to a living in the Church of England, nor can anyone who holds an advowson in trust for a Papist. To protect his property Cottington as-

signed the advowson to Fletcher under an arrangement that Fletcher should hold it in trust for him, and Fletcher presented to the living defendant 2 in the case. Subsequently Cottington became a conforming protestant, and he then sued for a re-assignment of the advowson. Lord Hardwicke indicated his opinion that, if Fletcher had raised a demurrer that Cottington could not plead his fraud against the law in that way, Fletcher would have succeeded. The report of that case is not very full, but in *Muckleston v. Brown* (4), Lord Eldon, commenting upon the case, expressed strongly the same view, though he appears to have doubted whether the report was correct in another respect. There it will be seen that Cottington was disclosing a contravention of what was regarded as a matter of the highest public policy, and yet he would not have been allowed to do so if objection had been raised. In *Curtis v. Perry* (5), Chiswell, a member of Parliament, had allowed ships bought by his partner, Nantes, with partnership money to be registered in the name of Nantes alone in order that they might be used for contract with the Government in violation of the Contractor's Act, under which no member of Parliament could have any interest in any contract with the Government. Lord Eldon said:

"The moment the purpose to defeat the policy of the law by fraudulent concealing that this was his (Chiswell's) property is admitted, it is very clear he ought not to be heard in this Court to say that it is his property."

And there the rule was applied, although there had been a fraud against another Statute also, 34, Geo. 3, C. 68, under which the name of the owner of every ship had to be registered. But no vindication of public policy even in those very important matters could avail against the general rule. In the same case Lord Eldon quoted an unnamed and reported case, in which Lord Kenyon dismissed a bill for the reconveyance of property given by the plaintiff to his son as a nominal qualification for a seat in Parliament in fraud of a Statute regarding qualifications for Parliament. In none of those cases was the fact that the confession of fraud would have disclosed the contravention of an important rule of public policy embodied in a Statute treated as having any effect in qualifica-

(1) [1918] 1 Q.B. 223=87 L.J. K.B. 333=118 L.T. 347=34 T.L.R. 168.

(2) [1892] 2 Q. B. 724=61 L. J. Q. B. 738=4 Rang. 42=67 L. T. 782=41 W. R. 116=57 J.P. 213.

(3) [1740] 2 Atk. 156.

(4) [1801] 6 Ves. 52=5 R. R. 211.

(5) [1801] 6 Ves. 740.

tion of the general rule. It will be observed that Cottington was trying by his plea to undo the evasion of a Statute and thereby to recover his property, almost exactly what the plaintiff is trying to do in respect of Ex. 1 in this case.

Can we suppose that there is any special sanctity about the Registration Act, which would bring in an exception to the general rule? No doubt the registration of a sale deed in the proper office is a matter of public policy. But it can hardly be suggested that it is a matter of higher public policy than the questions dealt with in the cases I have quoted. Why should the plaintiff, who has joined in the fraud in this case, be allowed to profit by it or to plead it? Is it a matter of overmastering public policy that the vendee under Ex. 1 should not be allowed to remain in possession because Ex. 1 was not validly registered. I think a recent amendment of the law by the legislature shows that there can be no such overmastering public policy in connexion with the Registration Act. Under S. 53 (a) recently added to the Transfer of Property Act a vendee, who has got only an unregistered sale deed, may protect his possession by pleading part performance and may actually use the unregistered sale deed to prove the terms of the sale. When the legislature has provided in that way for effect being given to a transfer, though the Registration Act has not been complied with, we cannot say that it is even a matter of public policy that the vendee under Ex. 1 should not be allowed to remain in possession. In my opinion the plaintiff cannot be allowed to plead or take advantage of any invalidity in the registration of Ex. 1. Ex. 1 on its face is a validly registered document, and for the purpose of this case we must treat it as such.

Anantakrishna Ayyar, J.—Under Ex. 1, four items of properties are purported to be sold to defendant 1. Item 4 covered by Ex. 1, is one cent of inam dry land situate in Chadala village attached to the Ongole Sub-Registration District; whereas items 1, 2 and 3, Ex. 1 are lands attached to Kothapatnam Sub-Registration District. The document was presented to the Ongole Sub-Registrar for registration and was registered by him. The allegation in para. 3 of the plaint regarding this matter was as follows:

"Besides this, whereas defendant 1 should

have got the said document registered at Kothapatnam, he got it registered at Ongole by including unjustly and fraudulently some other properties unnecessarily. Hence the said document is not at all valid in law and defendant 1 cannot acquire any right whatever under the said document."

Defendant 1's plea was that item 4 also was sold to him but that the plaintiff and others re-purchased from defendant 1 the one cent of land (item 4) on payment of a small amount and are in possession thereof.

Both the lower Courts have held that parties to Ex. 1 could never have intended that item 4 should form part of the property conveyed by the document, and that it could never have been intended that any title should pass thereunder in item 4—one cent—that the executants of Ex. 1 had no shadow of title to that one cent and that defendant 1 also must be taken to have been aware of the same. It was for the convenience of the plaintiff, and his brother defendant 43—who was employed at Ongole and at their suggestion that item 4 was included in Ex. 1 and the document registered at Ongole. On these facts it was argued for the plaintiff that the registration of Ex. 1, is invalid in law. On behalf of defendant 1 it was argued that the plaintiff was equally party to the fraud as defendant 1 and that it is not open to the plaintiff to allege his own fraud and claim relief on that basis. The plaintiff's learned advocate replied to this argument by saying that the Registration Act is a statute of public policy, and that there could be no estoppel against the provisions of such a statute. Our attention was also drawn to the decision of the Privy Council in the cases reported in *Harendra Lal v. Haridasi Debi* (6) and *Viswanath Prasad v. Chandra Narayana* (7). After having the question argued before us, I have come to the conclusion that it is not open to the plaintiff in such circumstances to allege his own fraud and claim relief on that basis. In Broom's Legal Maxims, the maxim is quoted "*nemo allegans suam turpitudinem audiendus est*"—No one alleging his own baseness ought to be heard. Another maxim is referred to, viz., *nullus commodum capere potest de injuria sua propria*—no one can take advantage of his own wrong.

(6) A. I. R. 1914 P. C. 67=23 I. C. 637=41 I. A. 110=41 Cal. 972 (P.C.).

(7) A. I. R. 1921 P. C. 8=63 I. C. 770=48 I. A. 127=48 Cal. 509 (P.C.).

tage of his own wrong. It is also said : "*in pari delicto, potior est conditio possidentis*"—in equal fault, the condition of the possessor is more favourable. Various decisions have been cited in support of the principle underlying the above legal maxim, but I do not propose to go into the same. It is stated in Story's Equity Jurisprudence, Vol. 1, S. 421 :

"In general, where parties are concerned in illegal agreements or other transactions whether they are *mala prohibita* or *mala in se*—Courts of equity following the rule of law as to participants in a common crime, will not interpose to grant any relief acting upon the known maxim: *in pari delicto potior est conditio defendantis et possidentis*. The old cases often gave relief, both at law and in equity, where the party would otherwise derive an advantage from his iniquity. But the modern doctrine has adopted a more severely just, and probably politic and moral rule, which is, to leave the parties where it finds them, giving no relief and no countenance to claims of this sort : see also Edn. 3, Story's Equity Jurisprudence by Rendall, S. 298."

In *Raghupati v. Nrishongi* (8) Sir Asutosh Mookerjee, J., discussed this question. The learned Judge in addition to quoting some English authorities also quotes the following passages from certain American decisions :

"The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of a particeps criminis, it is but a just infliction for premeditated and deeply practised fraud, which when detected, deprives him of anticipated profits, or subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself by an exertion of its powers, by shifting the loss from the one to the other, or to equalize the benefits or burthens which may have resulted by the violation of every principle of morals and of laws. Or, as Chancellor Walworth states it :

"Wherever two or more persons are engaged in a fraudulent transaction to injure another, neither law nor equity will interfere to relieve either of those persons as against the other from the consequences of their own misconduct."

In *Scott v. Brown* (2) the Court of appeal made certain observations which are relevant to the present case. Lindley, L.J. said: *ex turpi causa non oritur actio*.

"This old and well-known maxim is founded on good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not.

If the evidence adduced by the plaintiff proves the illegality the Court ought not to assist him. If authority is wanted for this proposition, it will be found in the well-known judgment of Lord Mansfield in *Holman v. Johnson* (9)."

Lopes, L. J. quoted an extract from the judgment of Cockburn, C. J., in *Begbie v. Phosphate Sewage Co.* (10) at p. 499 to the following effect:

"The plaintiff cannot present his case to the jury without necessarily disclosing the unlawful purpose in furtherance of which this money was paid."

It has to be observed that though the illegality of the contract was not pleaded by the defendant, the point was taken by the Court and acted upon.

A. L. Smith, L. J. observed at p. 734:

"Now, how does the law stand upon the subject? If a plaintiff cannot maintain his cause of action without showing, as part of such cause of action, that he has been guilty of illegality, then the Courts will not assist him in his cause of action. This was decided in *Taylor v. Chester* (11) where the illegality was pleaded, and also in *Begbie v. Phosphate Sewage Co.* (10) where it was not pleaded, but, the fraud being apparent, the Court would not interfere."

In *Petheperumal v. Muniandi Servai* (12), the Privy Council held that the contemplated fraud must, according to the authorities, have been effected and that then, and then alone, does the fraudulent grantor or giver, lose the right to claim the aid of the law to recover the property he has parted with : see p. 559.

In the present case the fraud has been effected, the plaintiff has got his money, and the defendant was put in possession of the properties. Therefore the plaintiff could not be given relief. Reference may be made to a decision of this Court in the case reported in *Janu Sait v. Ramaswami Naidu* (13). There the plaintiff entered into a contract for the purchase of rice in violation of rice control regulations. The rice purchased was subsequently commandeered by the Government under the regulations. It was held that the purchaser was not entitled to recover the portion of the price paid by him to the defendant by reason of such commandeering when it was proved that both the plaintiff and defendant knew of those restrictions and were parties to the illegal contract. Phillips, J., observed at p. 568 (of 18 L. W.) "when both parties are in *pari delicto*, the maxim *in pari delicto potior est conditio possi-*

(9) 1 Cow. 343.

(10) [1876] 10 Q. B. 491=44 L. J. Q. B. 233.

(11) [1870] 4 Q. B. 309=38 L. J. Q. B. 225.

(12) [1908] 35 Cal. 551=35 I. A. 98 (P.C.).

(13) A. I. R. 1923 Mad. 626=72 I. C. 735.

(8) A. I. R. 1923 Cal. 90=71 I. C. 1.

dentis applies and the Courts will not assist the plaintiff to recover in such a case."

Devadoss, J. observed at p. 576 as follows:

"In this case, the contract has been fully completed and the plaintiff who seeks relief on the ground of fraud, is not entitled to it, as I find on the evidence that he was not deceived as regards the terms of the license, and his conduct in getting rice without a licence to buy in Negapatam was in violation of the rules framed in the interests of the public. This point is fatal to the plaintiff's case and he is entitled to no relief."

See also *Jones v. Merwnethshire Society* (14) at p. 182. where Lindley, L. J., observed;

"The plaintiff is not entitled to relief in a Court of equity on the ground of the illegality of his own conduct: in order to obtain relief in equity he must prove not only that the transaction is illegal but something more; he must prove either pressure or undue influence. If all that he proves is an illegal agreement, he is not entitled to relief."

Some very early English decisions were also cited to us in which the Court made similar observations that the plaintiff in such circumstances would not be given any relief when he has to plead his own fraud as part of his cause of action.

The fraud in this particular case having been effected, as already mentioned, it is enough to rely on the decision in *Petheperumal v. Muniandi Servai* (12) to decide this point against the plaintiff. The Privy Council decisions reported in *Harendra Lal v. Haridasi Debi* (6) and *Viswanath Prasad v. Chandra Narain* (7) are not really applicable to the exact point that we are now considering. The question there was not whether the plaintiff could be allowed to set up his own fraud, but whether registration was properly and validly effected when the question arose with reference to third parties.

P.R.S./P.N. Order accordingly.

(14) [1892] 1 Ch. 173=61 L. J. Ch. 138=65 L. T. 685=40 W. R. 273=17 Cox. C.C. 389.

A. I. R. 1932 Madras 316

CURGENVEN, J.

(*Taiyyati*) Vasudevan Nambiyar and others—Plaintiffs—Appellants.

v.

(*Unnikatungi*) Nedungathiripad and others—Defendants—Respondents.

Appeal No. 248 of 1929, Decided on 21st October 1931.

(a) Civil P. C. (1908), O. 11, R. 21—Appeal is competent even against order dismissing suit under R. 21 notwithstanding that judgment and decree are passed.

When an order is made under the provisions of O. 11, R. 21 dismissing the suit and simul-

taneously with that order judgment and decree are passed, notwithstanding that an appeal lies against the decree itself, an appeal is competent against order that the suit should be dismissed.

[P 317 C 1]

(b) Civil P. C. (1908), O. 11, R. 21 and O. 6, R. 5—Provision quoted in dismissing suit being O. 11, R. 21—Order however being in substance under O. 6, R. 5—In judging of its appealability Court should look to substance.

Where the provision of the law quoted in dismissing the suit is O. 11, R. 21, but everything points to the order itself in substance and in intention having been one under O. 6, R. 5 in judging of the appealability of order the Court has to look to the substance of it rather than the provisions of law under which it purports to have been made: 19 I.C. 448; A. I. R. 1921 Mad. 417; A. I. R. 1930 Lah. 468, Rel. on.; A. I. R. 1921 Mad. 599; 23 Mad. 517; 28 Mad. 127, Ref. [P 318 C 1].

C. S. Swaminathan—for Appellants.

K. Kutti Krishna Menon and Kunhi Krishna Menon—for Respondents.

Judgment.—This is an appeal against an order of the Subordinate Judge of Ottapalam dismissing the plaintiff's suit for his failure to comply with the terms of a previous order calling upon him to supply certain information in response to interrogatories filed by the defendants. Two preliminary objections have been taken to the maintainability of the appeal. It is said in the first place that the appellant should have appealed not against the order but against the decree and judgment which were passed simultaneously with that order. It is true that in the ordinary course the dismissal of the suit was embodied in a judgment and a decree, but O. 43, R. 1 (f), Civil P. C., provides for an appeal against an order under R. 21, O. 11; and supposing for the purpose of this point that the order under reference fell within that provision, I think that an appeal is contemplated not only against the decree itself but against an order that the suit should be dismissed; or to put it in other way, that the dismissal of the suit is by an order under R. 21, O. 11, and that the provision quoted makes it appealable. The mere circumstance that it necessarily involves the dismissal of the suit, and therefore that it brings into existence a decree, is not, I think, conclusive against this point of view because we find that O. 43, R. 1 provides for appeals against orders which similarly involve the dismissal of a suit;—see for instance Cl. (b)—(an order under O. 7, R. 10) Cl. (e)—(an order under O. 10, R. 4) and Cl. (h)—(an order under O. 16, R. 20).

I am not prepared to hold accordingly that it is not open to a party against whom an order under O. 11, R. 21, Civil P. C., has been passed to appeal against that order notwithstanding that it has resulted in the dismissal of the suit.

The second preliminary point contains a good deal more substance. It is that the order of the Court dismissing the suit must be deemed to have been passed in virtue of the failure of the plaintiff to comply with an order under O. 6, R. 5, Civil P. C. That order enables the Court to call upon a party to furnish a further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading. Now the suit was one for a lump sum of money estimated at Rs. 15,000, and complaint was made by the defendant that the plaintiff did not disclose in reasonable detail the particulars upon which that claim was founded. Accordingly, two months after the filing of the plaint, and before the written statement was filed, a petition was filed under O. 6, R. 5 requesting the Court to pass an order directing the plaintiff to state certain additional particulars contained in an affidavit which, it was added, were absolutely necessary considering the nature of the suit and which the plaintiff was bound to give in the plaint. The Court thereupon passed an order which it headed "O. 6, R. 5, Civil P. C." in the terms required, adding that the information sought might be put into the form of interrogatories. After the interrogatories were filed an order was passed in justification of calling upon the plaintiff to answer them and the reasons given were that in this plaint he had given no details of the money spent, or the dates of disbursements, and that his claim was only in the form of a consolidated amount. It was added that he was bound to disclose the purpose for which the alleged disbursements were made and then only the defendants could say how far the claim was justified. I take that to mean that the defendants could not be called upon to answer the plaint by a written statement unless they had that information. Accordingly the plaintiff was asked to answer the interrogatories as a means, I take it, of rendering more precise the statement made in the plaint. It has been sought to argue that because the matter was put into the form of interro-

gatories, it was intended that O. 11 and not O. 6 should apply to this proceeding. I do not think that there is anything in the term "interrogatory" to lead necessarily to that conclusion. It is true that it is used in O. 11 and not in O. 6; but in the first place, it is only synonymous with "question" and, in the second, it is evident from the Court's own heading of its order that it intended at that stage to proceed under O. 6 and not under O. 11. I have been asked to infer from the nature of the questions administered that they were more in the nature of eliciting evidence than of filling up gaps in the pleadings, but I have been through them together with the plaint, and it appears to me that the information asked for might very well have been expected to be found originally in the plaint and, in fact, that in several respects, such as questions with regard to the inclusion of interest, of salary and of the particulars of special expenses, suits, customary expenses, etc., that they should have been included in making the original claim.

To comply with the Court's order the plaintiff was given a considerable time for furnishing answers to these questions and having, in the view of the Court, failed satisfactorily to comply with its order, the suit was eventually dismissed; and the main ground for claiming that the order dismissing the suit was under O. 11, R. 21, is an express statement in the order itself that it was dismissed under that order. That no doubt, taken by itself, is *prima facie* evidence of the intention of the Court, but I do not think it is conclusive of the nature of the proceeding and so of the order which was actually passed at the close of it. The main reason for holding that O. 6 and not O. 11 applies is undoubtedly the stage of the suit at which the application was made. It was made, as I have said, very shortly after the plaint was filed and before the written statement was filed and clearly in order that the defendant might have materials upon which to prepare it. Now it cannot be said that, generally speaking, the Court is justified in calling upon a party to answer interrogatories, which are in the nature of eliciting evidence, under O. 11 at that stage; whereas there can be no question that at that stage it is perfectly proper to remedy a defect in the pleadings by an order under R. 5, O. 6. It is abundantly

clear that at any rate when it started out the lower Court intended its order to be of that character. The learned Subordinate Judge does indeed seem to have lost sight of that circumstance and may no doubt have been misled by the form in which the information was sought, but as I have said the mere fact that that was by question and answer is not any conclusive test. Having regard to all the circumstances, I am clear that the application was one under O. 6, R. 5 that the original orders were passed upon it under that rule and that the order dismissing the suit would have been a perfectly legal order to pass for a failure to comply with the terms of that rule. This has been held recently by Reilly and Cornish, JJ., in *The Nedungadi Bank v. The Official Assignee of Madras* (1), and indeed it is difficult to see what other course a Court could adopt upon the failure of a plaintiff to furnish the information required by R. 5 except to dismiss the suit. In all these circumstances I think that although the provision of law quoted in dismissing the suit was O. 11, R. 21, everything points to the order itself in substance and in intention having been one under O. 6, R. 5. That being so, it is, I think, clear that in judging of the appealability of an order we must look to the substance of it rather than to the provision of law under which it purports to have been passed. This principle has been acted upon in several cases in this Court, such as *Man-gayya v. Sriramulu* (2), *Chengaru v. Raman Nayar* (3), as well as in a recent Lahore case, *A.I.R. 1930 Lah. 468*. There are other decisions, of which *Muthiah Chettiar v. Govinddoss Krishnadoss* (4), which follows *Abdul Rahiman Sahib v. Ganapathi Bhatta* (5) and *Lutchmanan Chetty v. Ramanathan Chetty* (6), are examples, but those are not, I think, cases in which the order under reference might have been passed under some other provision of the Code. They were cases in which the Court, although purporting to act under a certain provision, had in fact no power to pass such an order and it was held nevertheless because the order purported to be under an appealable rule of the Code, an appeal would lie against

it. My conclusion accordingly is that I must treat this case as closing with an order passed under R. 5, O. 6 and that being so no appeal is allowed against it by the Code. The appeal is accordingly dismissed with costs.

P.R.S./P.N.

Appeal dismissed.

A. I. R. 1932 Madras 318

ANANTAKRISHNA AYYAR, J.

R. Gopalaswami Naidu—Petitioner.

v.

K. Sakalaguna Naidu — Opposite Party.

Civil Revn. Petn. No. 652 of 1931,
Decided on 14th October 1931.

Presidency Small Cause Courts Act (15 of 1882), S. 41—Ejectment suit is maintainable though lessor is mortgagee and mortgagor the lessee—Execution of both mortgage and lease on same day is immaterial.

Where after the execution of a mortgage with possession the mortgagee leased out the property to the mortgagor on the same day by a separate rent deed with a stipulation of ejectment without notice, on nonpayment of the rent, the lessor mortgagee can file a suit for ejectment in the Presidency Small Causes Court: *A. I. R. 1921 Bom. 285, Dist.; 9 Mad. 57, Foll.* [P 320 C 2]

K. K. Sridharan—for Petitioner.

S. Ramachandran—for Opposite Party.

Order.—This is a revision petition filed by one Gopalaswamy Naidu who was the respondent in an application for ejectment filed against him in the Small Cause Court, Madras, by one Sakalaguna Naidu who is the respondent before me. The facts are these: On 4th March 1916 the petitioner before me, i. e., Gopalaswamy Naidu executed a mortgage deed in favour of Sakalaguna Naidu. The document purports to be in some respects a combination of simple and usufructuary mortgage. The mortgagee was to have possession of the mortgage property, but there are certain stipulations therein regarding the interest to be paid on the principal amount. On the same date a deed of rental agreement was entered into between the mortgagor and the mortgagee under which the mortgagor was to remain in possession of the property on payment of a rent of Rs. 22-8-0 per mensem and the lease was to enure for a term of three years and there are also other conditions in the deed of rental agreement.

There is a provision in that document that, in case of a failure to pay rent as stipulated therein, the mortgagee was entitled to possession of the property even without giving notice to quit or notice demanding possession. On the allegation

(1) A.I.R. 1930 Mad. 473=53 Mad. 645.

(2) [1913] 19 I.C. 448.

(3) A.I.R. 1921 Mad. 417=63 I.C. 961.

(4) A.I.R. 1921 Mad. 599=45 Mad. 919 (F.B.).

(5) [1900] 23 Mad. 517=10 M.L.J. 305.

(6) [1905] 28 Mad. 127=14 M.L.J. 436.

that rent was allowed to fall in arrears, the mortgagee under the rights secured by the deed of rental agreement aforesaid applied to the Small Cause Court, Madras, under S. 41, Presidency Small Cause Courts Act to eject Gopalaswamy Naidu.

The main plea, as I am informed, urged in the lower Court was that the Small Cause Court had no jurisdiction to proceed under S. 41 of the Act, though from the lower Court's order it is not clear that the objection was put in that exact form before it. The learned Judge of the Small Cause Court held that having regard to the fact that a separate deed of rental agreement was executed, and having regard to the condition in that deed mentioned by me already, and rent being in arrears, Sakalaguna Naidu was entitled to apply under S. 41, and he accordingly directed the ejectment of Gopalaswamy Naidu. The present revision petition is filed against that order. On behalf of Gopalaswamy Naidu his learned advocate argued before me that the deed of mortgage and the deed of rental agreement are both dated 4th March 1916, that they should be treated as part and parcel of one and the same transaction, and that being so, whatever rights Sakalaguna Naidu may have should be taken to be those under the mortgage and therefore S. 41 would not apply to the present case. On behalf of Sakalaguna Naidu, the respondent before me, his learned advocate argued that the contention urged on behalf of the petitioner does not take full notice of the fact that in the present case in addition to a deed of mortgage there is also a separate deed of rental agreement and that in such cases it is open to the lessor (because he must be so styled in law when we have to examine critically the rights of the parties at this stage) to enforce his rights under the rental agreement if for any reason he thought fit to do so. As I was informed that such transactions are common in this city, at the outset I inquired of the learned advocates who appeared before me whether there have been any previous decisions on this question. The learned advocate for the respondent only mentioned that such ejectment applications based on such leases were common but that the matter has not come up for direct adjudication before the Courts. In the circumstances, in disposing of the question raised, I must proceed on the wording of S. 41, Presi-

dency Small Cause Courts Act. The learned advocate for the petitioner argues that the present case is governed by S. 19 of the Act and not by S. 41. S. 19 speaks generally of suits for the recovery of immovable property. A specific provision covering some cases is made by S. 41. That section enacts:

"When any person has had possession of any immovable property situate within the local limits of the Small Cause Court's jurisdiction and of which the annual value at a rack rent does not exceed Rs. 2,000 as the tenant, or by permission, of another person, or of some person through whom such other person claims, and such tenancy or permission has determined or been withdrawn such other person may apply to the Small Cause Court for a summons against the occupant calling upon him to show cause."

One of two things must be shown under S. 41, viz., that the respondent to the application was either a tenant or a person who was occupying the property by the permission of another person and that such tenancy or permission has determined or been withdrawn. In the case before me, though it is no doubt true that the lease deed is in some way connected with the mortgage, the very circumstance that the parties to the transaction thought it proper or necessary to have a separate deed of rental agreement with specific conditions as in the present case, governing their rights would prima facie show that Gopalaswamy Naidu should be taken to be a tenant for the purpose of S. 41. In any event after the execution of the usufructuary mortgage deed by him in favour of Sakalaguna Naidu possession passed to Sakalaguna Naidu and Gopalaswamy Naidu should be taken to have been subsequently in possession only with the permission of Sakalaguna Naidu. That permission has been withdrawn admittedly. It therefore seems to me that the present case comes within the scope of S. 41 of the Act. The learned advocate for the petitioner drew my attention to a case in *Bhaichand Kirparam v. Ranchhodas Manchharam* (1), and in particular to the passage at p. 180. The following passage from the judgment of Shah, J., was read to me:

"It is clear in my opinion that the claim for possession and rent arose under the mortgage. No doubt the claim for rent as also for possession was based upon the rent note; but the rent note itself was the result of the mortgage and the claim based thereon must be taken to arise under the mortgage."

The question that arose for direct deci-

(1) A. I. R. 1921 Bom. 285=45 Bom. 174.

sion in that case was whether the equity of redemption of the mortgagor in the property mortgaged, which was sold in Court auction and purchased by the mortgagee in execution of a decree for rent obtained by him on the basis of a rent deed similar to the one before me, still vested in the mortgagor. The learned Judges held that such a sale would be irregular having regard to the provisions of O. 34, R. 14, but that the mortgagor should seek his remedy under S. 47 of the Code in the circumstances. It seems to me that there are some observations probably more direct to the point in a decision of our own Court in the case reported in *Sivarama v. Subramanya* (2). There also there was a mortgage and a lease, and the mortgagee argued that he was entitled to a charge on the property not only for the principal amount of the mortgage but also in respect of the rent for which he has obtained a subsequent decree in a suit for rent. The question arose between the first mortgagee and a later second mortgagee: the contention of the second mortgagee was that in the circumstances the first mortgagee was entitled to a charge on the property only to the extent of the principal amount of his mortgage. The lower Courts in that case had upheld the contention of the first mortgagee. On second appeal to the High Court, Hutchins and Parker, JJ., reversed the decision of the lower Courts; and at p. 60 they make the following observations which seem to help me to decide the case here:

"By letting the mortgaged properties to the mortgagors under the stipulation that they should pay rent in lieu of interest, the respondent elected to convert the interest into rent. No doubt such a course has its advantages; but he is not entitled to those advantages and also to the advantage of treating the sum conditioned to be paid as if it were interest. He sued for it as rent, and not as interest; and under the terms of the decree, directing the sale of the property, the sum now in question was awarded to him as rent. There is no foundation for the contention that arrears of rent are a charge on the land as against an encumbrance."

Applying those observations to the case before me the arrangement between the parties has its own advantages. The mortgagee, who may be called the lessor for the present purpose, had the advantage of enforcing his rights under the lease deed without being under the necessity to have to enforce his rights under the mortgage document. If he would be

(2) [1886] 9 Mad. 57.

entitled to recover rent as was held in *Sivarama v. Subramanya* (2) it seems to me that he would be entitled to recover possession also of the property, the other conditions being complied with. It therefore seems to me that Sakalaguna Naidu in the case before me would be entitled to possession as soon as the tenancy was terminated or the permission withdrawn. Having regard to the wording of S. 41 it seems to me that the present case would come within the scope of that section; and it being admitted that the tenancy has been terminated and the permission withdrawn, Sakalaguna Naidu was within his rights in having applied to the Court of Small Causes under S. 41, and that he was not bound to go to the City Civil Court to enforce his right to possession under his mortgage. This is the only point argued before me, and as I find myself unable to agree with the contention of the learned advocate for the petitioner, the revision petition will stand dismissed with costs.

P.R.S./W.D. *Revision dismissed.*

*** A. I. R. 1932 Madras 320**

WALLACE, J.

P. Seenappa Chetty — Petitioner.

v.

Emperor—Opposite Party.

Cr. Revn. No. 508 of 1931, Cr. Revn.

Petn. No. 451 of 1931, D/-10-12-1931.

*** Explosives Act (1884), Ss. 5 and 7 — Rr. 3 and 10—"Throw downs" and "Chinese crackers are explosives."**

Accordingly to the amendments to Rr. 3 and 10 under Explosives Act even "throw downs" and "Chinese crackers" are explosives. [P 320 C 2]

A. Viswanatha Ayyar—for Petitioner.

Public Prosecutor—for the Crown.

Order.—There can be no doubt that, under the amendments to Rr. 3 and 10 under the Explosives Act even "throw downs" and Chinese crackers are "explosives." The previous rulings of this Court to the contrary were based on an oversight of the amendments, and cannot be regarded as now applicable.

Technically then, the petitioner is guilty of the offence. But in the circumstances petitioner may be forgiven for not possessing more knowledge on the point than learned Judges of the High Court. It would have been sufficient if he had been warned not to repeat the offence. That I cannot do now, as he is absent. The fine is reduced to rupee one. The balance if paid will be refunded.

P.R.S./R.M. *Order accordingly.*

A. I. R. 1932 Madras 321

BEASLEY, C. J. AND CORNISH, J.

L. S. M. Govindaswami Pillai—Petitioner.

v.

Ramalingaswamy and others—Opposite Parties.Civil Misc. Petn. No. 5962 of 1931,
Decided on 9th December 1931.**Certiorari—Writ of, cannot be issued when other remedy is available.**

Where the Act gives an election officer jurisdiction to examine the nomination papers and scrutinize them and listen to objections and having listened to those objections, to decide whether the nomination papers should be received or rejected, the High Court cannot interfere with his decision by certiorari even if he were wrong as he had jurisdiction to make the order and as that is a matter for which there is a remedy provided by means of an election petition. Certiorari should only be granted when no other suitable remedy exists: *A. I. R. 1923 Mad. 475, Dist., (Case law referred).* [P 321 C 2, P 322 C 2]

K. Rajah Ayyar for *E. Vinayaka Rao*—for Petitioner.*The Govt. Pleader*—for the Government.*S. Muthia Mudaliar* and *K. P. Ramakrishna Ayyar*—for Opposite Parties.

Beasley, C. J.—This is an application for the issue of a writ of certiorari to the election officer, Tanjore Municipality. The petitioner was a candidate for election as Councillor to one of the Wards of the Tanjore Municipality. Under S. 49, District Municipalities Act, any person who is interested in a subsisting contract made with or any work being done for the Municipal Council except as shareholder in a company is disqualified for election as a Municipal Councillor. Under the rules made under that Act, the officer who has to deal with the nomination papers of the candidates is the election officer. His duty is to receive nomination papers and under R. 7 (2) to examine them and decide all objections which may be made at the time to any nomination and either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary reject any nomination on any of the grounds mentioned therein. One ground given is that a candidate is ineligible for election under S. 48 or S. 49 of the Act. Objection was taken to the reception of the nomination paper of the petitioner here on the ground that he was disqualified under S. 49 of the Act by the reason of the fact that he was interested in a subsisting contract with the Municipal Council and

the election officer after an inquiry rejected the nomination paper finding that he was interested in a subsisting contract with the Municipality. Hence this application for a writ of certiorari.

On the last occasion we directed notice to the Government Pleader and other persons at the request of Mr. Vinayaka Rao, who then appeared for the petitioner here, and ordered an interim stay of the election. Respondent 1 here, of those other persons, was the only one who received notice and appears here by counsel.

It is urged by Mr. Rajah Ayyar, that this is a proper case for the issue of a writ of certiorari. But the Government Pleader contends that it is not because it is only in cases where the Court or the Officer, whose acts are sought to be made the subject of certiorari, has acted without jurisdiction or in excess of jurisdiction or assumed a jurisdiction which it or he ought not to have assumed, that a writ of certiorari can issue. The second point is that, even if he has acted in excess of his jurisdiction, writ of certiorari is a discretionary remedy and one which will be seldom exercised. Thirdly, he argues that the discretion of the Court where it exists should not be exercised in cases where there is another remedy to the hand of the petitioner.

The first question to be decided here is whether the election officer had jurisdiction, whether he acted in excess of it, or assumed a jurisdiction which he ought not to have assumed. Clearly, the election officer had jurisdiction. The Act gives him jurisdiction, and him alone to examine the nomination papers and scrutinize them and listen to objections and having listened to those objections, to decide whether the nomination papers should be received or rejected. This has been the subject of a decision by the Calcutta High Court, even if it required any authority. Reference was made to *Manindra Chandra v. Provesh Chandra* (1), a decision of Sanderson, C. J., and Richardson, J., in an appeal which came up to them from a judgment of Page, J. There the Returning Officer, after summary inquiry, acceded to the objection raised that the appellant there was not eligible for election to the Bengal Legislative Council on the ground that at the

(1) *A. I. R. 1924 Cal. 761=79 I. C. 1042=51 Cal. 279.*

date of his nomination, he was a member of the Council of State and rejected his nomination. It was held in the circumstances that the High Court should not interfere in the proceedings and question the validity of the Returning Officer's decision. On p. 287 (of 51 Cal.) Page, J. says as follows:

"In my opinion the duty to be performed by the Returning Officer under Regn. 21 is not ministerial but judicial, and the function with which he is thereunder entrusted is to entertain all objections duly made to nominations which have been properly presented to him under the rules, and to decide, having regard to such objections, whether the nomination impugned is to be accepted or rejected; provided always that he is not entitled to refuse a nomination except upon one of the grounds specified in Regn. 21. At the scrutiny of nominations on 11th October the Returning Officer rejected the nomination of the applicant on grounds 1 and 3 of Regn. 21, because he found as a fact, that at the date of his nomination, the applicant was a member of the Council of State. In my opinion, whether or not the applicant at the time was a member of the Council of State, and if so whether his nomination paper ought to be refused, were matters within the ambit of his Returning Officer's jurisdiction, and it was his duty under the rules to decide them."

On appeal Sanderson, C. J., said:

"The Returning Officer, in my judgment, considered the question which was for his determination, and in considering that question, he had to put an interpretation upon the rules to which I have referred. He may have put a wrong interpretation upon them. Or he may have put a right interpretation upon them. In those proceedings, it is not for us to say whether he was right, or whether he was wrong. To my mind it is clear that he did not usurp a jurisdiction which he did not possess. He did not refuse a jurisdiction which was vested in him. Nor is it suggested that he was actuated by any mala fides or extraneous circumstances. The result is that in my judgment, this Court should not interfere in these proceedings and under these circumstances. In my opinion that point alone is sufficient for the disposal of the appeal."

It is in my view, too clear to really permit of any serious argument to the contrary, that the election officer here was acting within his jurisdiction in deciding this question. That being so, the further question is whether he having had jurisdiction to decide the case, this Court ought to interfere by means of a writ of certiorari. Upon this point there is a decision of the *Queen v. St. Olave's District Board* (2). There Campbell, L. C. J. says:

"I am of opinion that the certiorari ought not to have been granted, and that the rule to quash this order must be discharged. It is clear that the decision of the inferior tribunal, if on a point which it had jurisdiction to decide is final. And it seems that, on well established principles quite

consistent with all that was said in *Regina v. Bolton* (3) in this case the Metropolitan Board of Works had jurisdiction to decide whether the claimant had been an officer or not. . . . Then if they having jurisdiction to inquire did think that de jure he was an officer and entitled to compensation, their order by which they determined that he was so and awarded him compensation was within the Act, and not removable by certiorari."

It is quite unnecessary to refer to any other decisions to the same effect and they are very numerous. That being so it seems to me that this Court clearly cannot, and even if it could, interfere by certiorari with the decision of the Election Officer. He may have been wrong. If he was wrong, then that is a matter for which there is a remedy provided by means of an election petition. It is argued that it is not an efficacious remedy, and that it is unjust to relegate the petitioner to that remedy, because all manner of things unfavourable to him might happen in the meantime. We have been referred to a decision of this Court in *Sarvothama Rao v. Chairman, Municipal Council, Saidapet* (4), a decision of Schwabe, C. J., and Wallace, J. Whatever may have been stated in that case, the observations there are, in my view, of no applicability here. Moreover, one of the learned Judges who was a party to the judgment, and who himself made some observations in the case, has in a later case explained those observations away to a great extent. In *Desi Chettiar v. Chinnaswami Chettiar* (5), a case in which the facts were very closely similar to those in this, Wallace, J., says:

"The petitioner is not without his remedy. His remedy lies in an election petition which, we understand, he has already put in. It is argued for him that that remedy which merely allows him to have set aside an election once held is not as efficacious as the one which would enable him to stop the election altogether; and certain observations *Sarvothama Rao v. The Chairman, Municipal Council, Saidapet* (4), at p. 600 (of 47 Mad). are quoted. In the first place, we do not see how the mere fact that the petitioner cannot get the election stopped and has his remedy only after it is over by an election petition will in itself confer on him right to obtain a writ. In the second place, these observations were directed to the consideration of the propriety of an injunction in a civil suit, a matter with which we are not here concerned. And finally it may be observed that these remarks were made some years ago when the practice of individuals coming forward to stop elections in order that

(3) 1 Q.B. 66=4 P. & D. 679=5 Jur. 1154.

(4) A. I. R. 1923 Mad. 475=73 I. C. 619=47 Mad. 585.

(5) A.I.R. 1928 Mad. 1271=113 I.C. 874.

their own individual interests may be safeguarded was not so common."

In my view the remedy for the petitioner here is to prefer hereafter an election petition, and if he is able to show that the rejection of his nomination paper by the Election Officer was wrong, then, of course, the election will be set aside and he will have an opportunity of standing again for election to the Municipal Council.

For these reasons in my opinion, this rule must be discharged. This case I think is a fit one for the award of increased costs to the respondents. I fix the fee to the Government Pleader at Rs. 250 and the costs of respondent 1 at Rs. 75. The interim stay granted is dissolved.

Cornish, J.—I am of the same opinion. It was admitted by the petitioner's counsel on the last occasion that the petitioner has a remedy by an election petition and therefore even if a case was made out for the issue of a writ of certiorari, I do not think that the Court should exercise its discretionary power in favour of the petitioner, the rule being that certiorari should only be granted when no other suitable remedy exists: see *Annie Besant v. Advocate-General of Madras* (6) (at p. 160 of 43 *Mad.*) But I do not think there is ground for the issue of certiorari in this case. The Election Officer is by the rules, empowered, either on his own motion or on objection made to him that a candidate is disqualified under S. 49, to reject a nomination. That involves a power and duty of deciding whether in fact the candidate is so disqualified. The Election Officer is the tribunal appointed by the Act and the rules for this purpose. It has been argued that the order of the Election Officer holding that the petitioner is disqualified by reason of being interested in a contract with the Municipal Council is wrong. But the decision of a tribunal does not become without jurisdiction because it is wrong; and unless there is some manifest defect of jurisdiction in the order of the tribunal, the Court will not quash it. *Reg v. St. Olave's Board of Works* (2) and *The Colonial Bank of Australia v. Willan* (7). Even if the conclusion of the Election Officer was erroneous upon the facts before him, he had jurisdiction to make

the order and there is no room for interference by certiorari.

P.R.S./K.N.

Petition dismissed.

A. I. R. 1932 Madras 323

BEASLEY, C. J. AND CORNISH, J.
Valjee Kanjee & Co.—Appellants.

v.

Horsookdas-Balakrishnadoss—Respondents.

Original Appeal No. 35 of 1929, Decided on 7th October 1931, against decision of Kumaraswami Sastri, J., D/- 8th August 1929, in C. S. No. 733 of 1923.

Negotiable Instruments Act (1881), S. 35—Defendant demanding payment of dishonoured hundis on representation that he is either holder or endorser—Plaintiff paying amount—Plaintiff can recover if representation is untrue—Person not endorsing his name on bill cannot even enforce payment.

If a person delivers a bill to another without endorsing his own name upon it, he does not subject himself to the obligations of the law merchant; he cannot be sued on the bill either by the person to whom he delivers it or by any other. As he does not subject himself to the obligations, he is not entitled to the advantages also, i. e., he cannot enforce against others a liability on the bills to which he himself is not subject. It is only holders or endorsers, who have been made liable to a succeeding holder, that can demand payment of amount due on dishonoured hundis. Where therefore a person is made to pay the amount on the representation that the defendant was either a holder or endorser, he is entitled to receive the sum so paid if the representation made to him is found to be untrue: *Van Wort v. Wolley*, 3 B. & C. 439, *Foll.* [P 324 C 2]

V. V. Srinivasa Aiyangar for V. C. Gopalaratnam and R. Swaminatha Aiyar—for Appellants.

K. S. Krishnaswami Aiyangar, D. R. Venkatesa Aiyar, S. R. Krishnamachariar and N. T. Shamanna—for Respondents.

Judgment.—The defendants are the appellants. They were sued by the plaintiffs to recover a sum of Rs. 12,000 paid to them in respect of three hundis aggregating in value Rs. 14,948. The plaintiffs based their claim on three grounds: misrepresentations, failure of consideration, and breach of contract. We think they were entitled to succeed on the first of these grounds.

The hundis in question were drawn by a man named Venkatasubba Rao on one Ohara, of Kobe in Japan, against a shipment of fibre. Subba Rao negotiated the bills with the plaintiffs and the plaintiffs negotiated the bills with defendants for

(6) A. I. R. 1919 P. C. 31=52 I. C. 209=20 Cr. L.J. 598=46 I.A. 176=43 *Mad.* 146 (P.C.).

(7) [1874] 5 C. P. 417=43 L. J. P. C. 39=30 L.T. 237=22 W.R. 516.

Rs. 11,800 odd. Defendants in their turn transferred the bills to Itoh & Co., a firm in Japan, together with the bills of lading relative to the shipment. The drawee dishonoured the bills and they were duly protested. Notice of dishonour was given by defendants to plaintiffs by letter dated 9th September 1920 calling upon them to pay to the defendants the full amount of the hundis with interest. The defendants sent a reminder to the plaintiffs on 23rd October 1920. A further reminder was sent on 3rd November 1920 which produced a cheque for Rs. 12,000 from the plaintiffs. In their letter acknowledging the receipt of this sum defendants wrote :

" We have pleasure to acknowledge your cheque for Rs. 12,000 as part payment of the above hundis being dishonoured. Kindly favour us with your cheque for the balance sum with interest due thereon at your earliest convenience. We will return the dishonoured hundis to you on receipt of same in due course. "

The plaintiffs therefore sent a further cheque for Rs. 137-8-0 representing the balance after deducting Rs. 1,200 already paid by them to defendants from Rupees 11,801 received on negotiations plus Rs. 336-5-3 overdue interest on that sum, and wrote :

" This settles the affair and we request you to return us the dishonoured hundis by return; otherwise we will make you liable for all damages sustained by us. "

The defendants' retort was that the plaintiffs had promised to pay the full amount of Rs. 14,948 and that this sum was payable by them to the defendants.

We think there can be no doubt upon the correspondence between the parties that the defendants were representing to the plaintiffs that they were entitled either in their capacity of holders or of endorsers who had been made liable to a succeeding holder, to demand payment of the amount due on the dishonoured bills from plaintiffs, and that on receipt of payment defendants would return the dishonoured instruments to the plaintiffs. It is equally clear that the plaintiffs were induced by those representations to make the payment of Rs. 12,000 to the defendants, and that they would not have made that payment had they known the true position, that the defendants were not entitled to make them liable on the bills and that defendants had no prospect of being able to return the bills to them.

The facts were that after the plaintiffs negotiated the bills with defendants, the

defendants had transferred the bills by delivery to Itoh, with authority to collect and to appropriate the amount due thereon in payment of a claim by Itoh against defendants upon some other dealings. When therefore the bills were dishonoured by the drawee Ohara, the defendants were not the holders. Itoh was the holder. He was the person entitled in his own name to the possession of the bills and to receive or recover the amount due thereon from the parties to the bills, within the definition in S. 8, Negotiable Instruments Act. Itoh retained the bills and was retraining the goods in the exercise of a lien which he claimed to have in respect of money alleged to be due to him from defendants for breach of contract. And it appeared in the course of the hearing of this appeal that the bills are even now in Itoh's power and possession.

Further, the defendants were not endorsers of the bills. They were transferors by delivery; and a transferor by delivery is not liable on the instrument: vide S. 58 (2), Bills of Exchange Act. It is true that there is no provision in the Negotiable Instruments Act corresponding to S. 58 (2). But this section simply embodies the law-merchant which was explained by Abbott, C. J., in *Van Wort v. Wolley* (1) at p. 445 as follows :

" If a person delivers a bill to another without endorsing his own name upon it, he does not subject himself to the obligations of the law-merchant; he cannot be sued on the bill either by the person to whom he delivers it or by any other. And as he does not subject himself to the obligations, we think he is not entitled to the advantages. Not being an endorser the defendants would not be liable on the bills, as provided by S. 35, Negotiable Instruments Act, to a succeeding holder; and consequently the defendants would have no right to enforce against the plaintiffs a liability on the bills to which they themselves were not subject. "

The alternative argument that the plaintiffs were liable to the defendants under the agreement (Ex. C) is answered by the terms of the agreement. The plaintiffs undertook to refund to the defendants the sum representing interest and stamp if Ohara objected to the inclusion of that sum, and they also undertook to refund "any reduction," made by Ohara from the invoice amount "for whatever reason." The meaning is quite clear, and to take the words "reduction for whatever reason" to include the dishonour of the bills on Ohara would be, in our view,

(1) 3 B. & C. 439=5 D. & R. 374=3 L. J. (o.s.)
K. B. 51.

to put an unwarrantable construction upon them.

There was accordingly no obligation on the plaintiffs to pay when they made the payment of Rs. 12,000 to the defendants, and as the money was paid as a result of the defendants' misrepresentations, the plaintiffs were entitled to recover it. The decree in their favour for Rs. 12,000 with interest at 9 per cent from the date of demand, viz., 10th March 1922, will therefore stand. But the learned Judge also gave the defendants on their counter claim a decree for Rs. 2,948 with interest being the difference between the amount paid by the plaintiff to defendants, i. e., Rs. 12,000 and Rs. 14,948, the amount of the bills. For the reason already given the plaintiffs were not liable to the defendants upon the bills, and this part of the decree will be set aside. The result is that the appeal is dismissed with costs and the plaintiffs' memorandum of objections will be allowed with costs. The respondents will have the costs of the counter claim in the Court below.

C. M. P. No. 191 of 1930.

Application to admit documents dismissed without costs.

P.R.S./K.N. *Order accordingly.*

A. I. R. 1932 Madras 325

VENKATASUBBA RAO AND WALSH, JJ.

K. M. Parthasarathi Chetty—Appellant.

v.

Secy. of State and another—Respondents.

Letters Patent Appeal No. 119 of 1927, Decided on 29th October 1931, against decision of Waller, J., D/- 5th January 1927, in C. C. C. Appeal No. 57 of 1925.

(a) *Madras Salt Act (1889), Ss. 41 and 43*—Section 43 does not create personal liability—Purchaser is not personally liable after salt is allowed to leave factory after payment of correct duty.

There is nothing in S. 43 which creates any personal liability. Where the Act casts no personal liability on a purchaser of salt, it would not be reasonable to hold him personally liable for duty on salt under a particular rule of the Salt Manual. A person not the licensee but the purchaser cannot be personally liable for the duty on salt which is not even inside the factory but has been allowed to leave it after paying what was considered the correct duty. [P 327 C 1]

(b) *Interpretation of Statutes—Fiscal enactment.*

Fiscal enactments must be construed strictly in favour of the subject. [P 327 C 1]

V. Radhakrishnaya—for Appellant.

The Govt. Pleader—for Respondents.

Walsh, J.—The plaintiff in this case the appellant before us purchased 800 maunds of salt from one Chengalvaroya Chetty who was a salt licensee at Cove-long Factory, Chingleput District. He applied on 27th February 1923 for permission to remove the said 800 maunds and obtained the same. But on account of certain restrictions made by the Government authorities as to the hours of removal he could not remove the salt till 1st March 1923. On that day the salt-tax had been increased by another Rupee 1-4-0 per maund. This sum was not collected from the plaintiff at that time and the salt was taken away. A demand for the payment of the sum of Rs. 1,000 was made on 23rd March 1923 and although he denied the liability, he paid the Rs. 1,000 under protest as he was threatened with coercive process and in order to avoid attachment and loss of his property. He brought this suit against the Secretary of State for India to recover the sum he paid under protest.

The defendant, the Secretary of State for India, pleaded in para. 5 of his written statement that

"under the Government of India Notification No. 4361, dated 24th April 1915 printed in G. O. No. 300 of 3rd May 1915, of the Government of Madras the duty payable is at the rate in force on the date on which the salt is actually removed."

The learned City Civil Judge found in favour of the plaintiff and this decree was reversed in appeal by Waller, J., and the present Letters Patent appeal is against that decree.

In order to understand the contention of the plaintiff it is necessary to quote the rule under which salt, which is the property of a licensee can be removed from the factory. This is found in the Salt Manual. S. 81 (2) which runs as follows:

"(1) An application in the prescribed form signed by the licensee and the purchaser or their authorized agents must be presented to the officer in charge of the factory together with the shroff's receipt for the amount of the duty and the other charges under S. 43-B, Salt Act, (sic) on the salt at least the day before the delivery of the salt is required. This rule may however be relaxed at the discretion of the Commissioner in factories where the issues per diem are small and where previous arrangements to provide officers for the conduct of sales are not required. An order for the delivery of the salt in the prescribed form will in any case be sent to the weighing officer. The duty and other charges to be paid by the applicants shall be those in force

at the time of the removal of the salt from the factory."

Subsection (2) says:

"When the weighment and bagging of the salt is completed, the weighing officer will fill up and sign the permit which will be countersigned after check weighment by the officer in charge of the factory, who will then allow the removal of the salt."

The notification quoted in para. 5 of the written statement was not produced at the trial or in the first appellate Court and in fact Waller, J., based his judgment on the fact that as he says:

"A perfectly valid rule had been framed under S. 85 of the Act, laying down that the duty payable is that in force at the time of the removal."

Relying also on this rule he was not prepared to follow *Brito v. Secy. of State* (1), on the ground that it was not known whether such a rule as this was in force in Bombay at the time of that decision.

Before us it was argued that the rule framed under S. 85 (2) (b), Madras Salt Act 4 of 1889 by the Governor-in-Council, Madras, was ultra vires; but when it came to arguments it was for the first time pointed out that the G. O. mentioned in para. 5 of the written statement was not one professing to be framed under S. 85, Act 4 of 1889, but professed to announce the rules framed by the Governor-General in Council under S. 28, Salt Act, Act 12 of 1882, Notification No. 4361 dated the 24th April 1915. We think that we can decide this case on another branch of the argument without going into the question of whether the rule relied on was ultra vires. It is contended for the appellant that under the Madras Salt Act, 4 of 1889, no personal liability attaches to the purchaser in such a case and that consequently S. 84, Salt Act under which this sum was sought to be recovered is not applicable. We think that this contention is well founded, and it has the support of the decision of a Bench of two Judges of this Court in C. C. C. Appeal No. 14 of 1918, with the reasoning in which we agree. This decision was relied on by the learned City Civil Judge. Waller, J., refused to follow it relying on the rule framed quoted above but the rule does not touch the question of personal liability and he does not discuss the question as to whether the liability is on the person or on the salt. S. 43, Act 4 of 1889, deals with the removal of salt from factory and it says:

"Subject to any rules which may be made by the Governor-General in Council) under S. 85 and the (Collector of Salt Revenue) under S. 85 - no salt shall be removed from any salt factory otherwise than on account of Government or for transport to a place of storage authorized by the (Collector of Salt Revenue, and no salt shall be removed from such authorized place of storage, except under a permit and upon payment of duty at the rate fixed by the Governor-General in Council under the Salt Act of 1882 and of the following charges:"

There is nothing here which creates any personal liability. However it was attempted to be argued before us that R. 81 (2), of the Salt Manual as amended laid down that

"the duty and other charges to be paid by the applicants shall be those in force at the time of the removal of the salt from the factory."

It was argued that this rule throws the personal liability on the applicants. Now we find from the earlier part of the rule that the application is to be signed by the licensee and the purchaser or his authorized agent. So presumably these persons are the applicants. The addition of the words "to be paid by the applicants" found in the Manual appears to be without any authority whatever. In the amendment slip in the book it purports to be authorized by a G. O. No. 411, Separate Revenue, dated 14th June 1915, which was issued with reference to G. O. No. 300, dated 3rd May 1915, alluded to above. In the whole of that order there is nothing about the payment by the applicants and the alteration which is referred to in the suit is clearly the first which runs:

"And the following at the end of R. (1) and the rates of such duty shall be that in force on the date of removal of salt from the factory."

There is no justification whatever for the addition of the words "to be paid by the applicants." The learned Government Pleader has admitted that there would be no justification in calling on the licensee in a case like the present when he is not the person who has removed the salt to pay the amount of the duty, and that it is payable by the purchaser. Yet the words relied on would obviously make the licensee liable also. The argument founded on the amendment of R. 81 (2) (1) therefore fails; but we would like to point out the very grave result of the alteration throwing personal responsibility on to persons on whom no personal responsibility has been cast by the Act, by some irresponsible editor in issuing the slip.

(1) [1881] 6 Bom. 251.

The learned Government Pleader then relies on the words in S. 84, Act 4 of 1889:

"All sums recoverable under this Act or in any way due to Government on account of the Salt Revenue may be deducted by the (Collector of Salt Revenue) from any money owing to the person from whom such sums may be recoverable or due which may be in the hands of the (Collector of Salt Revenue) or under his disposal or control or may be recovered by the (Collector of Salt Revenue) by attachment and sale of salt belonging to such person and remaining within the limits of a factory. If not so recovered such sums may be recovered by Collectors of Districts on application from the (Collectors of Salt Revenue as if they were arrears of land revenue."

This is really begging the question. The points at issue are:

- (1) Whether the sum is recoverable at all; and
- (2) whether if it is "due to the Government" at all it is due from any one personally.

It is an elementary principle that fiscal enactments must be construed strictly in favour of the subject. We find nothing in the Act which creates a personal liability in this case. It may be noted that under S. 41, when a licensee fails when called on to pay salt duty on salt still in the factory, it cannot be recovered from him personally but only by the sale of the salt, and the only charge for which he is personally liable is the cost of destroying the salt if that course is found necessary.

In the light of S. 41 it would be extraordinary to hold that a person, not the licensee but the purchaser, can be personally liable for the duty on salt which is not even inside the factory but has been allowed to leave it after paying what was considered the correct duty. Agreeing with the decision clearly quoted we find that plaintiff was not personally liable to pay the enhanced duty.

It therefore becomes unnecessary to consider a third ground raised in appeal, that assuming the order notifying the change of R. 81 (2) (1) is not ultra vires it conflicts with the rest of the rule which says that the duty should be paid on the day previous to presenting the application; that hence arises an ambiguity and that in enforcing a fiscal liability the subject should be given the benefit of the ambiguity. It has not been seriously contended that the relaxation of the rule mentioned in the second part of R. 81 (2) (ii) can apply to the present case because the restriction of hours was deliberately made to reduce removals to the normal daily amounts when it was anticipated

that otherwise they would be greater. There certainly does appear to us to be a clear contradiction involved in the case of a purchaser who has not the credit alluded to in R. 86 (1), but we need not consider that matter further. The appeal succeeds and is allowed with costs in all Courts.

P.R.S./K.N.

Appeal allowed.

A. I. R. 1932 Madras 327

CURGENVEN, J.

(Makarla) Venkataramanujamma —
Petitioner.

v.

(Kodavanlapalli) Chinna Venkata Reddi and another—Opposite Parties.

Civil Revn. Petn. No. 1533 of 1928,
Decided on 19th November 1931.

Civil P. C. (1908), O. 21, R. 16—Decree assigned — Consideration of question whether assignment is valid—Nonpayment of consideration (whole or part) is question wholly irrelevant under O. 21, R. 16.

The mere nonpayment in full or at all of the consideration for an assignment of a decree, if it is not coupled with some such allegation as that the assignment itself was nominal or invalid for some other reason, is a purely irrelevant question when the Court comes to consider under O. 21, R. 16, whether that assignment should be recognized : A. I. R. 1928 Mad 458, Ref.

[P 327 C 2, P 328 C 1]

P. Venkatarama Rao—for Petitioner.

V. S. Narasimhachariar—for Opposite Parties.

Judgment.—The petitioner assigned her interests in a mortgage decree to respondent 1 benami for respondent 2, and application was made by the former for recognition of the transfer under O. 21, R. 16, Civil P. C. In that proceeding the petitioner filed an objection that the full amount of the consideration of Rupees 1,500 had not been paid, but at the hearing she was absent and the Court found that this was not true and recognized the assignment and allowed execution. The petitioner has now sued in forma pauperis to recover the balance of the consideration and the learned District Munsif of Anantapur has dismissed the application on the ground that the suit is barred by virtue of the previous proceedings.

If it is so barred it must be because the question of the payment of the consideration is res judicata by virtue of the decision passed in the execution proceedings. It is conceded before me that the mere nonpayment, in full or at all of the consideration for assignment, if it is not coupled with some such allega-

tion as that the assignment itself was nominal or invalid for some other reason, is a purely irrelevant question when the Court comes to consider under O. 21, R. 16, whether that assignment should be recognized. I am asked to hold not only that the petitioner made the objection which she did about the nonpayment of the consideration but that she went further, or at any rate intended to go further, and said that it was agreed between her and the transferee that payment was to be a condition precedent to recognition of the transfer. There is certainly nothing of this in the statement which she is described as making, because although she seems to have said that she received only Rs. 200 out of the consideration and that the balance was still due, she admitted the execution of the transfer. I cannot therefore presume that by any special condition in the transfer the question of payment of consideration became any more relevant than it would normally be if no such condition were present. That being so it appears to me that a fatal objection to holding that this decision is *res judicata* is that, in the language of S. 11, Civil P. C., it was not a question directly and substantially in issue in the former proceeding between the same parties. In other words, if the transferor had appeared and successfully contested the question of consideration the Court would yet have had to hold that the transfer was valid and to have ordered execution to proceed: see *Rami Reddi v. Venkatanarasimulu*, A. I. R. 1928 Mad. 458. I think accordingly that the District Munsif has not found a valid reason for dismissing the application for leave to sue in forma pauperis, and allowing the petition with costs I direct him to restore it to his file and to dispose of it in accordance with law.

P.R.S./B.V.

Revision allowed.

* * A. I. R. 1932 Madras 328

WALLER AND PANDALAI, JJ.

Periyanan Chetty and others — Appellants.

v.

R. B. M. R. Govinda Rao and others — Respondents.

Second Appeals Nos. 163 to 173 of 1925, Decided on 2nd September 1931, against decree of Sub Judge, Ramnad, in Appeal Suits Nos. 15 to 25 of 1922.

(a) **Landlord and Tenant — Title to permanent lease by adverse possession — Payment of rent is immaterial.**

Payment or receipt of rent does not prevent a title to a permanent lease from being acquired by adverse possession: (*Case law referred*).

[P 332 C 1]

* * (b) **Hindu Law — Religious endowment — Privileges as to limitation of actions conferred on minors should not be extended to idols.**

Though it may be convenient to speak of an idol as a minor for certain purposes, e g., for the purpose of determining the powers of the manager of temple property and though by an easy extension of language the idol may be spoken of as a perpetual minor, it is illogical to extend to idols the privileges as to limitation of actions conferred on minors in the Limitation Act. The minors dealt with in that Act are human beings, not juristic persons like idols, and corporations who being themselves the creatures of a legal fiction can only hold property in an ideal sense. The acquisition, protection and loss of property by juristic persons can result only from the acts of natural persons and there is the highest authority for the view that notwithstanding the figurative minority attributed to idols, they are affected through the act of their managers by the rules of limitation and adverse possession. The possession and management of dedicated property belong to the shebait in whom, and not in the idol, is vested the right to sue when necessary for the protection of the property. Therefore the minority which may affect limitation in such cases is of the shebait and not of the idol. (*Case law referred*).

[P 333 C 1]

* (c) **Limitation Act (1908), Art. 144 — Limitation in respect of invalid permanent lease of temple property held by alienee is governed by Art. 144 and not by Limitation Act, Art. 134.**

The question whether in respect of an invalid permanent lease of temple property under which property is held by the alienee, limitation should be held to run from the date of the alienation or from some subsequent date such as the death, resignation or removal from office of the alienating dharmakarthas and of all his successors who have assented to this alienation, is one which is governed by Art. 144 as dharmakarthas and managers of temple property are not trustees within the meaning of Art. 134: *A. I. R. 1922 P. C. 123, Ref.*

[P 333 C 2]

(d) **Hindu Law — Religious endowment — Manager — Dharmakartha's rights are not higher than those of trustee.**

A dharmakartha is literally and no more than the manager of a charity and his rights, apart in some circumstances from the question of personal support, are never higher than those of a mere trustee (*Case law discussed*).

[P 334 C 1]

(e) **Limitation Act (1908), Arts. 144 and 134 — Lease by manager of temple — Adverse possession begins from date of lease.**

In the case of a sale by a manager of a temple or chattram, it does not matter whether he can be properly described as a trustee. For if Art. 134 does not apply Art. 144 would apply from the date of the sale. In the case of a permanent lease also, seeing that a temple manager has no beneficial interest which he can lawfully convey, the adverse possession would run from the date of

the lease, if as a question of fact it is found that the lessee asserted his rights to the knowledge of the dharmakarthas adversely to the temple : *A. I. R. 1922 P. C. 193, Appr.* [P 334 C 2]

(f) Landlord and Tenant — Agricultural lease—Provisions of English law apply when Transfer of Property Act does not apply — Rent fixed and not liable to increase—Tenant can lawfully erect buildings.

The provisions of Transfer of Property Act are not per se applicable to agricultural leases. English law is applicable to them and according to that law the tenant may lawfully erect buildings which improve the value of the land.

The rule that a tenant who has a permanent right of occupancy in agricultural land within a zamindari may be prevented from erecting buildings which are unsuitable for agricultural purposes has no application to a case where the rent is fixed and not liable to increase or decrease and is payable whether the land is cultivated or left waste. In a permanent lease of such character it cannot be said that the character of the holding will be changed or the landlord's interest imperilled by the erection of buildings. On the contrary the tenant being entitled, in the absence of any express prohibition, to use the land in any way not inconsistent with the purpose of the letting and the interests of the landlord, the erection of houses would appear only to increase the landlord's security. (*Case law referred.*)

[P 336 C 1, 2]

S. Srinivasa Ayyangar, V. Ramaswami Ayyar and G. Rajagopalan — for Appellants.

S. Varadachariar and T. L. Venkata-rama Ayyar—for Respondents.

Judgment.—The defendants are the appellants in these 11 second appeals. The suits were brought on behalf of Sri Subramanyaswami temple at Kunnakudi, one of the five temples collectively known as Anjukoil, of which the dharmakarthaship belongs to the Pandarasannadhi of Tiruvannamalai Mutt. The suits were originally brought by a receiver during the pendency of litigation as to the person entitled to the office of Pandarasannadhi of the Mutt and as such of the office of dharmakartha of the temples. After the litigation ended in 1920 by the Privy Council decision reported in *Nataraja Thambiran v. Kailasam Pillai* (1), the person declared entitled to the office was substituted as plaintiff. The suits were brought for the possession of various plots of land in a hamlet called Muruganendal in the village of Uyyakondan belonging to the temple which had been alienated by a permanent cowle dated 1st April 1865 by the then dharmakartha in favour of the dharmakarthas of two other independent temples from whom the

various defendants had obtained transfers of their several plots and either erected houses and other permanent structures or built walls with a view to constructing such structures. The plaintiff urged in the alternative that even if possession could not be given in defeasance of the cowle the defendants were entitled under it only to rights as agricultural tenants, and have no right to change the character of the land or to erect permanent structures and walls, and prayed for an injunction for their removal or for compensation.

The defence as to the cowle was that it was beneficial to the devasthanam and valid, and that even if it was invalid the cowledar and the defendants had by adverse possession acquired a valid title to a permanent tenancy. As to the right to put up buildings the defence was that the lease was not agricultural, that the use of the land for erecting houses was in no way an infringement of the conditions, that the houses had been built a very long time before the suit and that the plaintiff is not entitled either to an injunction for their removal or to compensation.

Most of the 17 issues framed were not referred to in the argument before us and are now immaterial. The District Munsif found that the cowle was not proved to have been granted for any beneficial purposes binding on the devasthanam, but he held that the suit to recover possession was barred by limitation and adverse possession. As to the nature of the cowle he held that it was not a purely agricultural lease and that the defendants were not prevented from building on the property. On these conclusions he dismissed the suits. The learned Subordinate Judge also held that the permanent cowle was beyond the power of the dharmakartha and not beneficial to or binding on the devasthanam. But he differed from the Munsif on the question of limitation and relying on the decision of the Privy Council in *Vidya Varuthi v. Baluswami Ayyar* (2), he held the suits not governed by Art 134, and also that the defendants had not pleaded or proved any title by adverse possession under Art. 144. The logical consequence of these findings was that the plaintiff became entitled to a

(1) A.I.R. 1921 P.C. 84=57 I.C. 564=48 I.A. 1=44 Mad. 283 (P.C.).

(2) A. I. R. 1922 P.C. 123=65 I.C. 161=48 I.A. 302=44 Mad. 831 (P.C.).

decree for possession. But the learned Judge having held that the defendants had not acquired title to a permanent lease by adverse possession went on to consider the case also on the footing that they had acquired such title. On that footing he held that the cowle was an agricultural lease and that the erection of permanent structures on agricultural land was improper and that by that act the defendants had forfeited the lease and disentitled themselves to retain possession. But he held that it would be too harsh to enforce the forfeiture by ordering delivery of possession and by way of relief he considered that it would be sufficient if the buildings and walls were ordered to be removed. He accordingly while refusing the plaintiff's prayer for possession awarded him a mandatory injunction ordering the defendants to remove the walls and buildings in their respective holdings in three months and to restore the lands to their former condition and raise cultivation on them as stipulated in the kararnama or counterpart Ex. B.

The defendants have appealed to this Court. The plaintiff did not file any memorandum of cross-objections within the time allowed against the refusal of his prayer for possession. But a memorandum was filed on 18th July 1927. Unless the delay is excused and the memorandum admitted the only question in the appeals would be whether the injunction for removal of the buildings and walls can be upheld. But the learned advocates have argued the question whether on the finding that the cowle was invalid and not binding on the devasthanam the suits for possession are barred by limitation under Art. 134 or Art. 144. They have also argued the question whether if possession cannot be ordered the injunction to remove the buildings can stand. These are the two questions for decision which we will deal with in that order.

As the original cowledars, the dharmakarthas of Iravatheswarar and Alagianachiamman temples, were not made parties to these suits, the original cowle which must be in their possession has not been produced. But Exs. A and B produced by the plaintiff prove the existence of the cowle and the terms thereof. Ex. A is the application dated 26th January 1865 by the cowledars stating that the wet and

dry lands in Muruganendal were lying in a ruined condition overgrown with bushes as the tank bund had breached and had been out of repair. The applicants stated that if the endal be given to them on perpetual cowle, they would spend the Rs. 500 necessary for repairing the tank and reclaim the nanja and punja and not only pay the rent for ever, but also utilize the income from the reclaimed lands (melwaram) equally for the worship of the two temples of which they were the dharmakarthas.

Exhibit B dated 24th April 1865 is the kararnama or counterpart of the cowle which was subsequently granted. It states the boundaries of the endal and then states that out of the lands within the said boundaries 7 mahs is fit for nanja cultivation, 15 kulies is fit for punja cultivation and 20 kurukams is the water spread of the tank. It states that the lands and the tank are lying waste incapable of yielding any income and overgrown with bushes and recites the application for the cowle. It then states that by order of the Athinam No. 165, dated 21st of the current month a cowle has been granted for kattuguthagai at Rs. 20 per year for the entire nanjas, punjas, topes, thoravu, vacant ground, etc. situated within the four boundaries. For the first three years the rent was fixed at $\frac{1}{4}$, $\frac{1}{2}$ and $\frac{3}{4}$ respectively of the full rent in consideration of the time the reclamation would take. From the fourth year (fasli 1278) and thereafter for ever the rent was to be Rs. 20 per year. The cowledars agreed to spend the money required for the reclamation and improvement of the nanjas and punjas themselves and to cultivate them and utilize a moiety of the melwaram for the worship of Iravatheswarar temple and the other moiety for the worship of Alagianachiamman temple and they further agreed that whether they cultivated the endal nanja and punjas or laid them waste they would for ever pay the agreed rent in the Kunnakudi temple and obtain receipt therefor.

It is clear from these documents that the whole area within the four boundaries was granted, that the grant was permanent, that the grant was made in view of the contemplated reclamation and cultivation of the area computed to be cultivable which was but a fraction of the whole, that though reclamation and

cultivation of the cultivable part was contemplated, the grantees were bound to pay the full rent from the fourth year whether they reclaimed and cultivated or left the land waste; and that the rent was from the fourth year to be unvarying whether the land was cultivated more or less or not at all. What has happened apparently is that the district (property demised?) has become far more valuable as house sites than it can be if cultivated and therefore the lessees have parcelled out the land in plots to various people for building houses and probably derived much profit thereby.

The Kunnakudi Devasthanam has therefore made repeated attempts to avoid the cowle of 1865 and to get back possession. Thandavaraya, the Dharmakarthha who died in 1902 and whose name appears in *Nataraja Thambiran v. Kailasam Pillai* (1), executed a fresh lease of the endal to one Raman Chetty and with his lessee brought several suits in 1900 against some of the persons in occupation which ultimately failed: see para. 12 of the written statement. Between Thandavaraya who became Dharmakarthha in 1893, on the death of Arumuga and Deivasikhamany, the grantor of the cowle of 1865, there were, it seems, two or three Pandarasannadhis. They never questioned the cowle though they must have been aware of the assertion by the cowledars of their permanent tenancy and possession under it and indeed must have accepted rents on the footing of the existence of such right. Thandavaraya actively sought to repudiate the cowle by his lease to Raman Chetty and the suits of 1900. The present suits were brought in 1918. If anything depends on the intention of the defendants to assert a title of permanent occupancy under the cowle adversely to the plaintiff's Devasthanam and on the knowledge of that Devasthanam that such assertion was being made, there can be no doubt that from at least 1902, i. e., for more than 12 years before the suit, the defendants have been asserting such right to the knowledge of Thandavaraya and his successors, whoever they were. If the period of limitation for these suits began to run in or at any time before 1902 it is clear that the running of time against the plaintiff would not be suspended by the fact that after the death of Thandavaraya in 1902, the office of Pandarasannadhi and Dharmakarthha was in litigation

from 1905 between Nataraja who set up claims to the office and those who disputed his claim and that it was only in 1920 that Nataraja was finally declared by the Privy Council not to have been validly appointed.

The appellants concede that the cowle of 1865 being a permanent alienation of temple property at a fixed rent was in the circumstances unjustified by any necessity or benefit to the temple and therefore beyond the power of the Dharmakarthha and invalid: *Palaniappa Chetty v. Deivasikhamany Pandarasannadhi* (3). But they contend that the suits instituted in 1918 to recover possession of property held under it is barred either under Art. 134 or Art. 144. The respondents contend on the contrary that a Dharmakarthha is not a trustee within the meaning of Art. 134, and as to Art. 144 that limitation for recovery of possession of lands improperly alienated by a Dharmakarthha runs not from the date of the alienation but from the death of the alienating Dharmakarthha and of every succeeding Dharmakarthha who assents to the alienation so that a new cause of action accrues on the assumption of office of every succeeding Dharmakarthha. For this the decision of the Privy Council in *Vidya Varuthi v. Baluswami Ayyar* (2) is relied on. Further, the respondent's learned advocate has gone to the length of contending that it is impossible for a title to a permanent lease to be acquired by adverse possession and that so long as rent is paid under the invalid permanent lease, possession cannot become adverse to the owner even to the extent of the lease alleged if it should be alleged to be permanent. The argument on these matters has ranged over a wide field involving reference to a great number of decisions; but we will confine ourselves to those necessary for the decision.

If the limitation applicable to these suits were to be determined according to the provisions of the Act as they now stand, the decision would be easy enough as the case would be governed by Art. 134-B introduced by Act 1 of 1929. But the decision must be on the Act as it stood in 1918. To state our conclusion shortly, it is that while we think Art. 144 is the one applicable, it is immaterial in

(3) A. I. R. 1917 P. C. 38=39 I. C. 722=44 I. A. 147=40 Mad. 709 (P.O.).

this case from which date adverse possession is held to run, the date of the cowle or some subsequent date, as in either case the suits are barred. We cannot agree with the learned Subordinate Judge that the plea of acquisition of permanent tenancy by adverse possession was not raised in the case and indeed his own decision rests on the basis that the defendants have by long and adverse enjoyment acquired the cowle rights which, according to him, are those of agricultural tenants and which they must have not violated by erecting permanent structures. We cannot also agree with the respondent's contention that it is impossible so long as any rent is paid or received for a title to a permanent lease to be acquired by adverse possession in India. The contrary has been held in many cases and must be held now to be beyond possibility of dispute: *Sankaran v. Periaswami* (4) *Parameswaran v. Krishnan* (5), *Icharam Singh v. Nilmony* (6), *Ram Rachhya v. Kamakhya* (7), *Subbayya v. Maddalaya* (8) and *Narasayya v. Venkatarama* (9). But it was urged that no tenant of lands in India can obtain any right to a permanent tenancy by prescription and the decision of the Privy Council in *Naina Pillai v. Ramanathan Chettiar* (10) at 355 (of 47 Mad.) was cited. What that decision means is that a tenant who has entered into possession under a valid lease which is not permanent cannot by his own assertion or act during the tenancy enlarge his rights into a permanent tenancy. That is not applicable when possession is held without valid tenancy or after a tenancy has terminated. If therefore the cowledars in this case and their transferees who admittedly got no valid right to any permanent tenancy from the Dharmakarthas have been in possession in open assertion of that right from 1865, and if it appears that from 1902 at the latest the Dharmakarthas knowing of the asserted right have allowed the defendants to be in possession under such right till 1918 we fail to see how the defendant's possession could be

anything but adverse so far as the permanent tenancy is concerned or how they can be evicted after 12 years of such adverse possession. In the case cited their Lordships say:

"A permanent right of occupancy in land in India is a right subject to certain conditions of a tenant to hold the land permanently which he occupies. It is a heritable right and in some places it possibly may be transferable by the tenant to a stranger. That permanent right of occupancy can only be obtained by a tenant by custom or by a grant by an owner of the land who happens to have power to grant such a right or under an act of the legislature" p. 244.

Custom was not proved. The statute pleaded did not support the plea. There was no grant of any permanent occupancy and all that was proved to be granted was nothing higher than a tenancy-at-will. Here there is a grant of a permanent cowle though an invalid one being in excess of the dharmakarthas' powers. As to the effect of such grants their Lordships say:

"In the case of a shebait a grant by him in violation of his duty of an interest in endowed lands which he has not authority as shebait to make may possibly under some circumstances be good as against himself by way of estoppel but is not binding upon his successors at pp. 252 and 253.

It is to be noted that their Lordships were not considering the effect of possession under an invalid grant continuing not only during the lifetime of the granting shebait but also during the lives of several of his successors against whom the grant was not binding and for more than 12 years after one or more of these successors have repudiated it.

The respondent attempts to meet this difficulty in the following way. A Dharmakartha is not a trustee in the English sense as no property vests in him but in the idol. Alienations by him in excess of his powers may be good for his lifetime. Every succeeding Dharmakartha has a fresh period of limitation after his accession to office to acquiesce in or repudiate an invalid alienation of temple property by any of his predecessors. If he does not repudiate it, it remains good for the period of his own office but not beyond. If he repudiates it but does not succeed in recovering the property for the temple, still the idol to whom the property belongs is not affected by limitation as it is in the position of a perpetual minor. The result of this argument if accepted would be that there is no period of limitation to recover temple property improperly alienated by a Dhar-

(4) [1890] 13 Mad. 467.

(5) [1903] 26 Mad. 535.

(6) [1908] 35 Cal. 470=12 C. W. N. 636=7 C.L.J. 499.

(7) A. I. R. 1925 Pat. 216=84 I.C. 586=4 Pat. 139.

(8) [1907] 17 M.L.J. 469.

(9) [1912] 16 I.C. 53.

(10) A. I. R. 1924 P.C. 65=82 I. C. 226=51 I.A. 83=47 Mad. 337 (P.C.).

makartha. For this chain of argument *Vidya Varuthi Thirtha v. Baluswami Ayyar* (2) and *Rama Reddy v. Ranga Dasan* (11), are principally relied on. We may at once dispose of the argument based on the perpetual minority of an idol that no limitation or adverse possession can run against it except in favour of a person who trespasses on the temple property. In *Rama Reddy v. Ranga Dasan* (11), there are passages which lend support to this view: see p. 549 and 550 (of 49 *Mad.*). One of us was a party to this decision. On reconsideration we beg respectfully to point out that though it may be convenient to speak of an idol as a minor for certain purposes e.g., for the purpose of determining the powers of the manager of temple property: *Prosunno Kumari v. Golab Chand* (12) at p. 458 *Abhiram Goswami v. Shyama Charan* (13) and though by an easy extension of language the idol may be spoken of as a perpetual minor, it is illogical to extend to idols the privileges as to limitation of actions conferred on minors in the Limitation Act. The minors dealt with in that Act are human beings, not juristic persons like idols, and corporations who being themselves the creatures of a legal fiction, can only hold property in an ideal sense. The acquisition, protection and loss of property by juristic persons can result only from the acts of natural persons and there is the highest authority for the view that notwithstanding the figurative minority attributed to idols, they are affected through the act of their managers by the rules of limitation and adverse possession. The possession and management of dedicated property belong to the shebait in whom and not in the idol is vested the right to sue when necessary for the protection of the property. Therefore the minority which may affect limitation in such cases is of the shebait and not of the idol: *Jagadindra Nath v. Hemanta Kumari* (14), *Damodar Das v. Lakkan Das* (15), *Chittar Mall v. Panchulal* (16).

(11) A. I. R. 1926 Mad. 769=56 I. C. 371=49 Mad. 543.

(12) [1874] 2 I. A. 145=4 B. L. R. 450=23 W. R. 253=3 Sac. 449=3 Suth. 102 (P.C.).

(13) [1909] 36 Cal. 1003=36 I. A. 148=4 I. C. 449 (P.C.).

(14) [1905] 32 Cal. 129=31 I. A. 203 (P.C.).

(15) [1910] 37 Cal. 885=37 I. A. 147=7 I. C. 240 (P.C.).

(16) A. I. R. 1926 All. 392=93 I. C. 652=48 All. 348.

If then limitation and adverse possession of temple property against the manager or dharmakartha may affect the idol and it is possible to acquire by adverse possession a title to a permanent lease the question is whether in respect of an invalid permanent lease of temple property under which property is held by the alienee, limitation should be held to run from the date of the alienation or from some subsequent date such as the death, resignation or removal from office of the alienating dharmakartha and of all his successors who have assented to this alienation. In the lower Court the defendants contended that the suits fell under Art. 134, Lim. Act, and to this the answer was that the Privy Council decision in *Vidya Varuthi Thirtha v. Balusami Ayyar* (2), has held that dharmakarthas are not trustees within the meaning of that article. This was accepted by the learned Subordinate Judge. The case itself was of a permanent lease by a matadhipathi of part of the general endowment of a mutt which was not the subject of any specific trust. The points before the Court were whether a matadhipathi was a trustee within the meaning of Art. 134 and whether adverse possession could be claimed by a permanent lessee from a matadhipathi under Art. 144. The judgment of their Lordships dealing with the first point contains an elaborate discussion of the legal position of not only matadhipathis, but dharmakarthas and managers of temples and other Hindu and Mahomedan religious foundations. The conclusion was that they were not "trustees" within the meaning of Art. 134 nor were the general endowments "conveyed in trust" to them so as to attract the application of Art. 134. This decision was pronounced in 1921 three years after these suits began.

It was in fact in consequence of doubts created by this decision and by later decisions of their Lordships and of Courts which were not always uniform as to its true meaning and effect, that in 1929 the new Arts. 134-A, 134-B and 134-C, were added. So far as the defendants rested their case of limitation on Art. 134 this decision is conclusive against it. But the decision on the second point dealt with, i. e., whether adverse possession under Art. 144 could be claimed by a permanent lessee from a

matadhipathi and if so from what date, that is not applicable to this case. It was in terms confined to unauthorized alienations by a mahant or matadhipathi and proceeded on the ground that a mahant could by reason of his personal interest in the income of the mutt property, apart from any question of necessity of the mutt, part with possession of the mutt property for his own life and his successors could also do likewise. Each mahant who allowed possession under the invalid alienation must be held to have authorized a new tenure for his own life during which period the alienees' possession would not be adverse to the mutt. Prima facie, this reasoning has no application to alienations by a temple dharmakartha like the one who granted the cowle in this case who has no personal interest for life or otherwise in the income of the temple property and to whom therefore no intention to part with possession of that property during the currency of any such interest can be attributed. For a dharmakartha is literally and no more than the manager of a charity and his rights apart in some circumstances from the question of personal support are never higher than that of a mere trustee: *Srinivasachariar v. Evalappa Mudaliar* (17).

But decisions on the point have varied. Even in the case of alienations by mahants their Lordships of the Privy Council recognized in 1925 (*Lalchand Marwari v. Ramrup Gir*) (18), (at p. 325 of 5 Pat.), that there may be some in which adverse possession runs from the dates of the wrongful alienations or at any rate from the date of final abandonment of office of the alienating mahant and not only from his death. As to temple dharmakarthas there are in this Court on one hand the decisions *Govinda Row v. Chinnathurai Pillai* (19), affirmed on another point in *Chinnathurai Pillai Row* (20) and *Rama Reddy v. Ranga v. Govinda Dasan* (11) already referred to which apply the decision in *Vidya Varuthi v. Baluswami Ayyar* (2) and on the other *Kuppuswami Mudali v. Samia Pillai* (21), *Majavath Alli v.*

Muzaffar Alli (22) and *Vadlamudi Sastrulu v. Venkateseshayya* (23), which hold that that decision does not apply to dharmakarthas and leaves untouched the case of *Gnanasambanda Pandara Sannadhi v. Velu Pandaram* (24), and the other Privy Council decisions in *Abhira Goswami v. Shyama Charan* (13), *Damodar Das v. Lakkan Das* (15) and *Ishwar Shyam Chand Jiu v. Ram Kanai Ghose* (25). In *Vadlamudi Sastrulu v. Venkateseshayya* (23), Phillips, J., who gave judgment in *Govinda Row v. Chinnathurai Pillai* (19) was a party.

It was held by Ramesam, J., that the decision in *Vidya Varuthi Thirtha v. Balusami Ayyar* (2), as to adverse possession, must be confined to the case of a mutt, and that in the case of a sale by a manager of a temple or chattram it does not matter whether he can be properly described as a trustee. For if Art. 134 does not apply Art. 144 would apply from the date of the sale. In the case of a permanent lease, also seeing that a temple manager has no beneficial interest which he can lawfully convey, the adverse possession would run from the date of the lease, if as a question of fact it is found that the lessee asserted his rights to the knowledge of the Dharmakartha adversely to the temple. To this Phillips, J., assented adding that the decision in *Vidya Varuthi Thirtha v. Balusami Ayyar* (2) must be confined to its own facts—alienations by matadhipathi. We think that this opinion is right. Whether the proper date from which adverse possession generally runs in cases of permanent lease by dharmakarthas be taken as the date of the alienation or some subsequent date as the death of the dharmakartha or his resignation, or removal from office, we have no doubt that on the facts of this case adverse possession began from before 1902 and that the suits for possession were therefore barred under Art. 144.

The next question relates to the right of the defendants to erect buildings on the property and whether the injunction against them can stand. Owing probably to attention being concentrated on the

(17) A. I. R. 1922 P. C. 325=68 I. C. 1=49 I. A. 237=45 Mad. 565 (P.C.).

(18) A. I. R. 1926 P. C. 9=93 I. C. 280=53 I. A. 24=5 Pat. 312 (P.C.).

(19) A. I. R. 1926 Mad. 193=91 I. C. 377.

(20) A. I. R. 1927 Mad. 850=104 I. C. 125.

(21) A. I. R. 1922 Mad. 406=70 I. C. 369.

(22) A. I. R. 1924 Mad. 201=77 I. C. 508.

(23) A. I. R. 1928 Mad. 614=110 I. C. 894.

(24) [1900] 23 Mad. 271=27 I. A. 69=7 Sar. 671 (P.C.).

(25) [1911] 38 Cal. 526=38 I. A. 76=10 I. C. 683 (P. C.).

main part of the case at the trial, the evidence as to facts necessary to be proved on this part of the case is practically non-existent. There are before us 11 cases of different persons in possession of different plots. There is practically no evidence as to what are the buildings erected by the several defendants on their several holdings and their nature and how long ago and under what circumstances each was built. The learned Judge in para. 13 of the judgment says:

"I find that the use of the lands for purposes other than agriculture disentitles the defendants to retain possession of the lands. But the remedy as (by way of) forfeiture is an extreme remedy. As the defendants have not erected pucca constructions on the suit property, but only raised compound walls here and there relief by way of injunction to remove the buildings and restore the lands for being cultivated would satisfy the end of justice."

In the decretal part he awarded the plaintiff an injunction ordering the defendants to remove the walls and buildings raised on the plaint lands in three months. There is much confusion here as to whether it is buildings or walls or both that have been erected. In the absence of clear evidence the learned advocates have referred us to the allegations in the several plaints from which it is seen that in four cases compound walls and tiled structures of some kind exist including in one plot a rice mill; in five other cases only compound walls exist, and in two, there are neither walls nor buildings, but stones have been collected.

The learned Judge fell into another error in concluding that because there were some areas in the endal which were cultivable and intended to be cultivated, the lease as a whole was purely agricultural and the tenant was bound to use the whole of the property demised either for raising wet crops or to leave it waste for ever. He is wrong when he says that the whole endal within the boundaries mentioned is not included in the cowle. That it is so included is clear from Ex. B. He says that no commission was issued to find out the total extent of the endal. Without doing so and finding out the particular spots intended for cultivation in Ex. B it was impossible to say whether the several plots used for buildings by the defendants are or are not included in the cultivable area. The result is that there is no evidence on which it can be said

that any of the defendants have built on area which was reserved for cultivation. On this ground, if on no other, the decree for injunction cannot stand.

The learned Judge was also in error in thinking that the defendants had incurred forfeiture of the tenancy by building on the land. Assuming, what is not proved, that any of the buildings or walls are on land intended for cultivation at the time of the cowle, the tenants cannot incur forfeiture thereby. The provisions of Transfer of Property Act are not per se applicable to agricultural leases nor to this cowle which is of the year 1865. In *Nayna Missir v. Rupikun* (26) a tenant of an agricultural holding planted it with mango trees to the knowledge but without the consent of his landlord thus changing the character of the land. More than three years afterwards the landlord sued for a mandatory injunction to have the mango trees removed. Wilson, J., delivering the judgment of the Bench said:

"No authority has been cited to us, nor any reasoning satisfactory to our minds tending to show that where a tenant has been guilty of a breach of duty in the use of his land such as making a tank, in it, building on it improperly, or changing the character of the cultivation this operates necessarily as a forfeiture and renders him liable to be evicted."

Even in cases to which S. 111, T. P. Act applies forfeiture is incurred only by breach of an express condition entitling the lessor to re enter or for denial of the lessor's title and in case the lessor should give notice of his intention to terminate the lease: *Parameshri v. Vittappa Shambaga* (27) and *Maharaja of Jeypore v. Rukhmini Pattamahdevi* (28). There is no such ground in these cases.

Lastly it is urged that no lessee is entitled without the lessor's consent to erect permanent structures on the land except for agricultural purposes and that the plaintiff is entitled to an injunction on that ground. S. 108 (p), T. P. Act, is relied on. Having regard to the utter want of evidence as to the nature of the buildings and when they were erected it is impossible to give any effect to this contention even if it were otherwise valid. In *Nayna Missir v. Rupikun* (26) above referred to there was a prayer for an injunction to uproot and remove the

(26) [1888] 9 Cal. 609=12 C. L. R. 300.

(27) [1903] 26 Mad. 157=12 M. L. J. 189.

(28) A. I. R. 1919 P. C. 1=50 I. C. 631=46 I. A. 109=42 Mad. 589 (P. C.).

mango trees. This was refused as the landlord had stood by for more than three years and allowed the tenant to spend his labour and capital upon the land without taking any action and in such circumstances under S. 56, Specific Relief Act, the Court would not grant an injunction. From the evidence of the only witness which was referred to at the hearing, house building in the endal began about 1897 and there are about 35 buildings in the portions of the endal sold by the cowledars.

It was about some of these buildings which Thandavaraya went and saw in 1898 that he brought suits in 1900. In fact the place has become a small residential colony. The rice mill erected by the defendants in S. A. No. 169 was erected in 1916 or 1917. The compound wall in S. A. No. 164 was erected in 1915 or 1916 and that in S. A. No. 173 between 1908 and 1911. On this evidence this suit for an injunction must in some cases at least be barred by limitation under Art. 32. In any case having in view the principles on which the Court will act in awarding mandatory injunction to remove structures already completed, the plaintiff has utterly failed to show that he is entitled to this remedy which would be discretionary even if he were entitled to prevent buildings being put up: *Ulagappan Ambalam v. Chidambaram Chetty* (29).

But in cases like the present which are not governed by the Transfer of Property Act, the law applicable would be the English law: see *Maharaja of Jeypore v. Rukmini Pattamah Devi* (28), at p. 598. According to that law, the tenant may lawfully erect buildings which improve the value of the land: *Jones v. Chappell* (30) and *Meux v. Copley* (31). In this Presidency a tenant who has a permanent right of occupancy in agricultural land within a zamindari may be prevented from erecting buildings which are unsuitable for agricultural purposes; *Ramanathan v. Zamindar of Ramnad* (32) and *Or V. v. Mrithyinjaya Gurukkal* (33). That is because the tenant is not entitled to change the character of the holding so as to endanger the interest of

the landlord who is entitled to a rent which may vary according to the nature and extent of the cultivation. It can have no application to a case like the present where the rent is fixed and not liable to increase or decrease and is payable whether the land is cultivated or left waste. In a permanent lease of the present character at an unvarying rent it cannot be said that the character of the holding will be changed or the landlord's interest imperilled by the erection of buildings. On the contrary the tenant being entitled in the absence of any express prohibition to use the land in any way not inconsistent with the purpose of the letting and the interests of the landlord, the erection of houses would appear only to increase the landlord's security.

For these reasons we think that the injunctions granted by the learned Judge must be refused.

In the result the second appeals are allowed and the suits dismissed with costs throughout.

The memorandum of objections is dismissed. No order as to costs.

P.R.S./K.N. Appeals allowed.

* * A. I. R. 1932 Madras 336

REILLY AND ANANTAKRISHNA
AYYAR, JJ.

Mariyayee Ammal—Defendant—Petitioner.

v.

Ponnuswamy Chettiar—Plaintiff—Opposite Party.

Civil Revn. Petn. No. 144 of 1928, Decided on 9th December 1931, against order of Sub-Judge, Madura, in S. C. S. No. 1912 of 1926.

**** (a) Civil P. C. (1908), O. 20, R. 4 (1)—Judgment of Small Cause Court must be intelligible—It is sufficient if it shows that Judge has grasped questions and that answers are not arbitrary.**

If with the aid of the record, the judgment, however brief, shows that the Judge has grasped the questions for decision and has answered them, not arbitrarily but for reasons which can be readily understood, then he has complied with the provisions which regulate his procedure. As regards points raising questions of law in a small cause suit, the judgment recording simply in "the affirmative" or in "the negative" the finding on such a point, is not ordinarily a proper judgment within the meaning of the Small Causes Courts Act. The actual extent of the discussion or of the reasoning, which led to the finding, would depend upon the circumstances of each case: (*Case law discussed.*) [P 340 C 2, P 343 C 1]

(29) [1906] 29 Mad. 497.

(30) [1875] 20 Eq. 539=44 L. J. Ch. 658.

(31) [1892] 2 Ch. 253=61 L. J. Ch. 449=66 L. T. 86.

(32) [1893] 16 Mad. 407=3 M. L. J. 185.

(33) [1901] 24 Mad. 65.

(b) Interpretation of Statutes — Various provisions should be interpreted consistently and harmoniously.

It is a sound rule of interpretation that the various provisions of a statute should if possible be so construed as to give a consistent and harmonious result. [P 342 C 1]

K. Rajah Ayyar and *V. Ramaswami Ayyar*—for Petitioner.

T. L. Venkatarama Ayyar and *M. S. Rathnasabapathi Mudaliar*—for Opposite Party.

Reilly, J.—This petition relates to Small Cause Suit No. 1912 of 1926 on the file of the Subordinate Judge of Madura. That suit was tried by the Subordinate Judge with another small cause suit between the same parties, No. 1530 of 1926. The plaintiff in each case was the brother of the defendant, a Hindu widow, who, it appears, was engaged in litigation with the representatives of a deceased co-widow about the property of her late husband. In Small Cause Suit No. 1530 of 1926 the plaintiff sued for the value of certain moveables, which his sister, the defendant, had recovered in a suit against her co-widow's representatives on the strength of an alleged agreement, under which, according to him, as he had given security for her in that suit, he was entitled to have possession of the moveable property which she recovered or its value if she recovered its value in money. In Small Cause Suit No. 1912 of 1926 he sued for arrears of salary claimed by him under a clause of the same agreement for his services to the defendant in connexion with that suit and with other litigation and other matters and interest on the arrears of salary. The two suits were tried together, and the learned Judge eventually after a number of hearings and a great many more adjournments disposed of them by one judgment. In that judgment he set out the pleadings at very considerable length. He then set out eight points for determination, which in the judgment he called "issues." But, though the trial had occupied him a long time, about 50 documents had been exhibited and 11 witnesses had been examined, he disposed of the whole matter in the briefest possible way. He said nothing more than this in the effective part of his judgment:

"I find issues 1, 2 and 6 in the affirmative and issues 3 to 5 and 7 in the negative, and on issue 8, I find that the plaintiff is entitled to interest at 6 per cent per annum only by way of damages under the Interest Act."

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That certainly in the circumstances appears to be a rather surprising judgment as the result of so much judicial labour as has been devoted to the trial of these two suits.

Revision petitions against the decrees made by the learned Judge in accordance with those findings in favour of the plaintiff in both suits were preferred to this Court by the defendant. Civil Revision Petition No. 143 of 1928 against the decree in Small Cause Suit No. 1530 has already been dismissed, and we have nothing to do with that now. The present civil revision petition against the decree in the other suit, i. e., the suit for the arrears of salary, came on first before Wallace, J. It was urged by the defendant in this petition that the judgment recorded by the learned Subordinate Judge was not in proper compliance with the provisions of law on the subject. Wallace, J., finding that different views have been taken by different Judges of this Court on different occasions, as to what must be contained in the judgment in a small cause suit, referred the petition to a Bench, expressing the opinion that it was desirable to have the ruling of a Bench on the question whether, when points of law arise for decision in a small cause suit, the Judge is bound to give some reasons for his decisions. That is how the matter has come before us.

The direct provision of law regarding the contents of a Small Cause Court judgment, so far as Provincial Small Cause Courts are concerned, is to be found in O. 20, Civil P. C. R 4 (1) of that order lays down that the judgment of a Court of Small Causes need not contain more than the points for determination and the decision thereon. But, although that is the only direct provision regarding what a judgment in a small cause suit should contain, we cannot leave out of consideration altogether on this question the provision in the Provincial Small Cause Courts Act itself which gives the High Court power to interfere in revision in a case like this. That is to be found in S 25 of that Act, which runs:

"The High Court, for the purpose of satisfying itself that a decree or order made in any case decided by a Court of Small Causes was according to law, may call for the case and pass such order with respect thereto as it thinks fit."

As I have mentioned, there has been some divergence of opinion about the exact interpretation of the first part of R. 4,

O. 20 of the Code, which I have quoted. Mr. Ramaswami Iyer, who appears for the petitioner in this case, has referred to several decisions on the question. He relies on a strong expression of opinion given by Seshagiri Iyer, J. in *Kandaswami Chetty v. Ramalinga Chetty* (1). The learned Judge in that case, having before him a very curious judgment in a small cause suit, which contained nothing more than this "Point: Is the plaint claim true? I find the plaint claim true"—not only decided that that was an entirely insufficient but expressed himself at some length upon the subject. What he said was:

"Speaking for myself, I have been under the impression while at the Bar that in this Court it had always been insisted upon, that the Judge of the Small Cause Court should give some reasons which would satisfy the High Court that he had applied his mind to the materials placed before him. Brought up in that tradition, while sitting in the admission Court, I have always insisted upon the lower Court exercising small cause jurisdiction giving some indication as to what was in its mind, so that I may be in a position to say whether its conclusion is right or not. There are three reasons for this attitude of mine. First of all, the High Court in exercising its powers of revision under S. 25 is really supervising the work of the lower Court. In order to enable it effectually to do its work, the lower Court must give us some materials upon which we can say that it has done its duty properly. Otherwise, we will have to go into the whole record to see whether the work has been properly done. That is from the point of view of the Judge of the High Court revising the work of the Small Cause Judge. Secondly, a party who has adduced evidence—it may be one or two witnesses in a case or half a dozen witnesses in another—must have some satisfaction that the Judge really has come to the conclusion whether his witnesses should be believed or not and whether his documents should be accepted as genuine or not. If after the examination of all the witnesses and documents a particular point is decided in a particular manner, the party will be able to see whether what he did has the approval of the Judge or not. Thirdly, what is most important is that the High Court should not encourage this habit of mind in the lower Court the habit of mind, as indicated further on the judgment, being a slack habit in disposing of such cases."

That is a strong expression of opinion that R. 4, O. 20 of the Code should not be interpreted literally. But not long after that the question came before a Bench in *K. M. Koppa Kurup v. Velayi Chettichiyar* (2) this decision of Seshagiri Iyer, J., was quoted, and the learned Judges very definitely dissented from it. They said:

(1) [1920] 59 I. C. 906.

(2) A.I.R. 1922 Mad. 360=70 I. C. 791.

"We think that the learned Judge's judgment was based on his opinion of what the practice should be in such matter rather than on what the law of procedure actually is. It seems to us that O. 20, R. 4 (1), is self contained and does not need any expansion or explanation by judicial rulings".

After that a similar question came before Srinivasa Iyengar, J. in *Moidu Koya v. Moidin Kutti Haji* (3). In that case the learned Judge had to deal with a small cause suit for damages for breach of contract. He felt himself bound by the decision in *K. M. Koppa Kurup v. Velayi Chettichiyar* (2) which I have quoted. But in the particular case before him he found that, though the District Munsif, who tried the small cause suit had set out the points for determination, he had not troubled to give a separate decision or finding on each one of them but had clubbed them all together and had found them all for the plaintiffs. Among other things that implied that he found that the defendants in the suit had committed breach of contract. But Srinivasa Iyengar, J., found from the record that it was impossible to understand how the District Munsif had come to that decision. He therefore regarded that method of writing a small cause judgment as improper and remanded the suit for fresh trial. More recently Sundaram Chettiar, J., has considered the question in Civil R. P. 1758 of 1927. There he had to deal with a complicated small cause suit, in which, as in this case, the pleadings had been set out at considerable length and then the trial Judge had merely said as has been said in this case, that he found issues so and so in the negative and so and so in the affirmative. Sundaram Chettiar, J. in remanding that case for fresh trial said:

"But in cases, though triable by a Small Cause Court if the facts are somewhat complicated and the points involved require a due consideration of mixed questions of law and fact, it goes without saying that any reasonable Judge would consider it his duty to express himself in the judgment in such a way as to give the indication that he has come to the conclusion after judicially applying his mind to the real points of controversy. If his judgment is contrary to law, that would be a ground for interference in revision. On complicated questions of law, if the Small Cause Court Judge contents himself with giving a finding in a monosyllable "Yes" or "No", it would be extremely difficult for a Court exercising revisional powers to understand how the learned trial Judge came to arrive at such a finding. It may be said that it would be strictly within the words of R. 4, O. 20 even if

(3) A.I.R. 1925 Mad. 1229=90 I. C. 968.

he did not give any reason for the finding, but yet one would expect him to give some reason, in justification of the finding arrived at by him."

So it will be seen that even after the decision of the Bench in *Koppa Kurup v. Velayi Chettichiyar* (2) learned Judges of this Court have not found it always possible or proper to interpret R. 4, O. 20 of the Code literally. Though these are the only cases of this Court which have been quoted before us, I think it is well known that there have been other instances in which the same divergence of opinion on this question has been shown as in the cases which I have mentioned.

For myself I think we must be careful not to strain the interpretation of R. 4, O. 20 in any way nor to impose any undue burden upon Judges of Small Cause Courts, who are intended by the law to dispose of their cases in a rapid and simple way. But, when we are interpreting R. 4, O. 20, we ought not in my opinion to divorce that rule from general principles which are applicable to all Courts. It is a principle of our administration of justice that Courts should conduct their work in public. The object of that is, not that the Courts or Judges sitting in them should be a show to the public, but that the public should be assured that decisions are not arbitrary. Now neither the public nor the parties concerned can be assured that decisions are not arbitrary unless they are made intelligible to those who follow them and, where revisional powers are given to superior Courts, the record is made intelligible to those revisional Courts. And every conscientious Judge must wish to make his decisions intelligible, not only out of consideration for the parties, whose rights and claims are laid before him for decision between them, but out of a sense of duty to the public, whose servant he is. Remembering that principle, is there anything against it in R. 4, O. 20 of the Code as it stands? I think, if we examine that rule, we shall find indication in it that the principle is to be maintained even in the judgments of Small Cause Courts.

The rule does not provide that a Judge of a Small Cause Court can dispose of a suit by saying merely: "Judgment for the plaintiff" or "judgment for the defendant." It is laid down that his judgment must contain the points for determination and the decision there on. What is

the object of that? Obviously to make his judgment intelligible to those who are interested in it and to those who have to deal with it. And that fits in with S. 25, Provincial Small Cause Courts Act. Under that section the High Court is given the power of revising the decrees or orders of Small Cause Courts, and it may call for the record of the proceedings of such a Court in order to satisfy itself that the decree or order made in any case is according to law. It may be observed that that provision means, not only that the High Court may take action when some party moves it to do so, but that the High Court has the power and the duty in proper cases of taking such revisional action, even though not moved to do so by any party, when the matter comes to its notice. That provision is a strong indication to my mind that there is no intention that Small Cause Court Judges, any more than other Judges should be allowed to deliver unintelligible judgments.

But I have been referring so far only to the first part of R. 4, O. 20. R. 4 (2) deals with judgments of other Courts, and its wording is important because it provides such a marked contrast with the wording of sub-R. (1). Sub-R. (2) is: "Judgments of other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision."

There it is laid down that in Courts other than Small Cause Courts reasons for the decisions must be given. There is nothing said about reasons for the decisions in sub-R. (2) dealing with Small Cause Courts. In my opinion we should certainly not interpret the rule, so far as it applies to Small Cause Courts, in such a way as to obliterate the very marked distinction drawn between the two classes of Courts by the omission of the words "and the reasons for such decision" in sub-R. (1). Any interpretation of the rule which laid down that Small Cause Courts must always give reasons in their judgment would in my opinion be entirely unjustifiable. And I should be very reluctant to say anything which laid any unnecessary burden upon small cause Judges, who are expected to do a large amount of work at high speed.

I think the solution of the question before us is to be found in the difference between the various kinds of points which may come up for decision in a

small cause suit. The rule is that the judgment need not contain more than the points for the determination and the decision thereon. There is nothing in the rule to the effect that the judgment may not contain more. Applying that rule reasonably, without forgetting the principles which should govern the administration of justice in all Courts, my own opinion is that when the Judge has to deal with a question of fact, we cannot demand that he should give anything more than his actual decision on that question—his answer to it if he does not think more to be necessary.

In a Small Cause Suit the Judge has to record a memorandum or note of all oral evidence given before him. The documents exhibited by the parties are in the record of the case. In a great majority of instances if the Judge states briefly what the contentions of the parties are and then mentions the points for determination, the answer to any question of fact raised as a point for determination will be quite intelligible, even if monosyllabic, when taken with the notes of evidence and the exhibits in the record. And in Small Cause Suits a great many of the questions of law which have to be stated as points for determination are, when the facts are once settled, very simple to answer. I see no reason why in a very large portion of cases the Judge should not be able to give quite an intelligible answer, sufficient for all purposes, to a simple question of law in a word or two. But in a Small Cause Court, as in other Courts, difficult questions of law may arise; and when a mere difficult question of law or of mixed law and fact arises, in my opinion a Small Cause Judge cannot perform his duty of making his judgment intelligible, unless he at least sets out so much of his reasoning as will make clear the road by which he has reached his conclusion. Personally I do not think it necessary to express any more definite opinion than that. The test whether R. 4 (1), O. 20, has been used or abused appears to me to lie in the answer to the question whether the judgment has been made intelligible. If with the aid of the record the judgment however brief shows that the Judge has grasped the questions for decision and has answered them, not arbitrarily, but for reasons which can be readily understood, then he has complied with

the provisions which regulate his procedure.

But we are concerned immediately with the case before us. How is the interpretation of the rule which I have adopted to be applied to this particular case? It is often easier to set out a general principle than to apply to it particular cases. Fortunately this is not a very difficult case in that respect. As I mentioned, the learned Judge set out eight "issues." Before going further I may refer to one contention raised by Mr. Ramaswami Ayyar, viz., that in this particular case the learned Judge did not mean to record merely the points for determination, as is done in an ordinary small cause suit, but actually framed issues for trial in the case. Mr. Ramaswami Iyer argued that as, issues had been framed, R. 5, O. 20 and not R. 4 applied, and therefore it was quite clear that reasons ought to have been given for the findings. But on examining the record I feel no doubt that although the learned Judge called the points for determination in the suit "issues," he did not mean issues in the sense of issues framed before the trial of the suit in order to guide the parties as to the points on which evidence or argument was required. The notes-paper in this case does not show any sign that regular issues were ever framed, and there would surely be a record of it, if such issues had been framed. The learned Judge I think obviously used the word "issues" merely as an abbreviation for the expression "points for determination." Of the eight points for determination in the two suits tried together, only five relate to this particular suit for arrears of salary. They are Nos. 1, 5, 6, 7 and 8. Point 1 is "Is the agreement set up in the plaint true?" That is a question of fact. Point 5 is "Did the defendant terminate plaintiff's service prior to 31st August 1926?" Another question of fact. Point 6 is "Has the plaintiff actually performed service for the defendant after 31st July 1925?"—another question of fact. A large amount of evidence was recorded in the case, and it cannot be suggested that the evidence does not support the learned Judge's findings on those questions of fact. In my opinion although he answered those questions merely with "Yes" or "No," we certainly cannot say that his answers are unintelligible or

such as we could properly interfere with. Point 7 runs: "Is the plaintiff bound to render accounts under the agreement, and if so, is S. C. S. No. 1912 of 1926 not maintainable?" and Point 8 "Is the plaintiff entitled to interest?"

Point 8 is a simple question of fact and law, and on that the learned Judge's answer is that the plaintiff is entitled to interest at 6 per cent by way of damages under the Interest Act. It is suggested by Mr. Ramaswami Iyer that, that is a mistake; but no one can say it is unintelligible. The answer to the simple question in point 7 depends directly upon the interpretation of the agreement, Ex. A. There is no doubt that the learned Judge is right in finding that under Ex. A itself the plaintiff was not bound to render accounts. It has been urged by Mr. Ramaswami Iyer that, if the defendant was bound to pay salary to the plaintiff, the plaintiff as her agent was bound to render accounts to her. Well if the defendant wished to sue the plaintiff for accounts, she could have done so, but not in a small cause suit. There is nothing unintelligible or, so far I can see, against the law in the learned Judge's finding on point 7. Therefore examining this particular case in the light of my view how R. 4 (1), O. 20 of the Code should be interpreted, I do not find that the learned Judge's judgment is unintelligible or insufficient or such as we can properly interfere with in revision.

In my opinion this petition should be dismissed with costs.

Anantakrishna Ayyar, J.—This revision petition has been referred to a Bench by Wallace, J., by the following order:

"While no doubt a Judge in a small cause case is not bound to write a judgment, it is obvious that, if points of law arise for decision, Judges should give some grounds; otherwise it is impossible for a Court of revision to say whether the Court has decided "according to law," as it is bound to do under S. 25, Provincial Small Cause Courts Act, unless, "according to law" means nothing else than in accordance with the law of civil procedure. On the other hand it is difficult to say that the Judge has erred in law when his reasons for his decision are unknown because he is not bound to give reasons at all."

"I understand that there is no Bench ruling on the point and that several cases of the same kind are pending in this Court. It is better to have a definite ruling once for all, instead of having different single Judges giving different rulings. I refer the case to a Bench for decision."

In order to arrive at a satisfactory solution of the question, it is necessary to bear in mind that the main object of the legislature in creating Courts of Small Causes is that in suits of small value, except when expressly excluded, the trial should be summary and justice should be speedily administered. Unlike judgments of ordinary civil Courts in original suits, the decrees from which are open to appeal, and, in which, for obvious reasons, the legislature has directed that the judgments should contain the points for decision, the decision thereon and the reasons for the findings, the legislature has specifically provided that in case of suits tried by Courts of Small Causes, the judgments need contain only the points for determination and the decision thereon: see O. 20, R. 4 (1), and compare it with the wording of O. 20, R. 4 (2): see also O. 50, R. 1, Civil P. C. Thus the provision in O. 20, R. 4 (2) that judgments should contain the reasons for the findings does not apply to judgments of Courts of Small Causes. The points for decision, called "the issues" in cases of original suits, may raise questions of fact in dispute between the parties or questions of law that may arise on the findings of Courts on questions of fact. As there is no appeal against findings of fact arrived at by a Court of Small Causes, it would ordinarily be enough that on points raising pure questions of fact, mere definite intelligible findings are recorded without giving reasons for the findings. The evidence in the case has to be recorded though not fully and in the manner prescribed in the case of original suits; but "notes of evidence" have to be recorded by the Court, and any finding arrived at in the absence of any evidence could be dealt with by the Court of revision as it thinks fit. Similarly, if the notes of evidence could not reasonably, or possibly, lead to the finding recorded, apparently on its basis, then too, the Court of revision could deal with it in any way it deems proper.

Points of law may involve mere "abstract" questions of law, or "mixed questions of fact and law." Under S. 25, Provincial Small Cause Courts Act, the High Court is given power:

"for the purpose of satisfying itself that a decree or order made in any case decided by a Court of Small Causes was according to law to call for the case and pass such order with respect thereto as it thinks fit."

We have thus two provisions of law to bear in mind, with reference to points raising questions of law in a small cause suit. While on the one hand the provision applicable to judgments in ordinary suits that reasons for findings should be given does not apply to judgments passed by a Small Cause Court, yet there is also the circumstance that a High Court is given the right:

"to call for the record of a case to satisfy itself that a decree or order made in a case decided by a Court of Small Causes was according to law."

The two provisions could not be treated as quite independently as if one has nothing to do with the other. It is a sound rule of interpretation that the various provisions of a statute should if possible be so construed as to give a consistent and harmonious result.

As regards points raising "mixed questions of fact and law," it is obvious that the High Court should know what the finding of fact is, and also what the finding on the question of law involved is. Difficult questions of law do sometimes arise, though I may say that even there the particular aspect in which and the circumstances under which the question of law arises may, with advantage, be stated, and is capable of being stated, in simple terms, in a large number of cases.

To see whether a finding in the simple affirmative or negative would be enough, I will take, for example, a question of limitation. The defendant might have pleaded that the suit is barred by limitation.

(1) Limitation might have been pleaded on the ground that the acknowledgment alleged to be contained in a particular document was in fact not made by the defendant, and, in any event, is insufficient to operate in law as a valid acknowledgment.

(2) Part-payment of principal or interest may be pleaded by plaintiff while denied by the defendant.

(3) The defendant might have pleaded that the plaintiff became major more than three years prior to the date of the plaint.

I need not multiply instances, if the "point" noted in the judgment simply be "Is the claim time-barred," and the finding be—a simple "yes" or "no"—the High Court could not properly exercise its powers of revision in such a matter. In such cases such a finding could not be said to satisfy the require-

ments of proper finding even in a small cause case.

When the High Court is given the jurisdiction to examine the correctness of the decree or order passed by a Court of Small Causes it seems to me that a correlative duty is also placed on the Small Cause Court to record its finding on the question of law in such a way as would enable the High Court to appreciate the exact finding on such a point on the face of the judgment, with a view to decide whether it is right or not. No doubt, questions of law could be discussed "very elaborately," and also "succinctly." How much of discussion is necessary in any particular case regarding any particular point of law will largely depend upon the circumstances of each case, and on the nature of the question of law that arises. But I am not able to accept the view that a Court of Small Causes does its duty legitimately—and in all cases—with reference to a point raising a question of law by simply saying "Yes" or "No" as its finding thereon, irrespective of any other consideration. I am not just now considering whether, even in the matter of doing bare justice to the judgment of the lower Court, mere recording "yes" or "no" on such points by the lower Court would ordinarily be really helpful; but the adoption of such a procedure by the Small Cause Court would often leave the High Court in a difficult position in the matter of discharging its duties under S. 25. Revisional jurisdiction conferred by S. 25 is similar to a right of appeal, but limited to consideration of questions of law only: see generally about the nature of revisional jurisdiction the Full Bench decision, *Chappen v. Moideen Kutty* (4). I should not forget that the High Court could call for the records of a case under S. 25 even without a petition from the parties if it chose to do so: see *Andrew Anthony v. Rev. J. M. Dupont* (5), *Sita Nath v. Baikunta Nath* (6) and *Batcha Sahi v. Abdul Gunny* (7).

No case directly deciding the point now before us has been quoted to us. I do not propose to discuss the cases which have got only a remote bearing on the point now before us. I am of opinion that as regards points raising questions

(4) [1899] 22 Mad. 68=8 M. L. J. 231 (F. B.).

(5) [1882] 4 Mad 217.

(6) [1911] 38 Cal. 421=9 I. C. 296.

(7) [1913] 38 Mad. 256=21 I. C. 308.

of law in a small cause suit, the judgment recording simply in "the affirmative" or in "the negative"—the finding on such a point is not ordinarily a proper judgment within the meaning of the Small Cause Courts Act. The actual extent of the discussion, or of the reasoning, which led to the finding, would depend upon the circumstances of each case, and this is the inference that I draw from the provisions which lay down what the judgments of Courts of Small Causes should contain and from the provisions which confer powers of revision on the High Court "to satisfy itself that a decree or order made in such a case was according to law." I do not think it advisable to say anything more than what I have said.

The only decision of a Bench of this Court binding on us, *Koppa Kurup v. Velayi Chettichiyar* (2) supports the view that we are inclined to adopt, regarding questions of fact arising in small cause suits. As regards questions of law, or mixed questions of facts and law, certain decisions by single learned Judges were cited. They are generally in consonance with the view I am inclined to take on such questions of law or mixed questions of fact and law.

On the merits of the case before us, fortunately the findings of the learned Judge in this particular suit are intelligible and there is evidence to support the same. No doubt the judgment speaks of "8 issues," but we have satisfied ourselves by a reference to the "note-paper" that they were no more than "points" noted by the Judge at the time of writing the judgment the findings on which would have a material bearing on the actual decree to be passed. The Court did not "frame issues" in this case, as one understands the expression in connexion with original suits. The present is not a case where, for any particular reasons, the Court thought it proper to frame "issues" and have them tried in the usual way, under O. 14 and O. 15, Civil P. C. I need not therefore say anything more about Mr. Ramaswami Iyer's contention based on O. 20, R. 5, Civil P. C.

I therefore agree that the civil revision petition should be dismissed with costs.

P.R.S./K.N.

Petition dismissed.

* * A. I. R. 1932 Madras 343

REILLY AND ANANTAKRISHNA
 AYYAR, J.J.

Sri Raja Bommadevara Chayadevamma Bahadur Zamindarini Garu—Appellant.

z.

Sana Venkataswami and others—Respondents.

Letters Patent Appeals Nos. 177 to 265 of 1923 and 80 to 99 of 1927, Decided on 20th October 1931, against decision of Devadoss, J., D/- 25th November 1924.

(a) **Madras Estates Land Act (1908), S. 3 (4) (f)—Cocoanut trees are fruit trees and cocoanut plantations are improvements within meaning of the Act.**

The term "fruit trees" should not be confined to those trees alone which produce edible fruit. Cocoanut trees are fruit trees within the meaning of the Act and the planting of cocoanut trees comes within the definition of "improvements" in the Act: *A. I. R. 1927 Mad. 137, Diss. from.* [P 344 C 2]

(b) **Interpretation of Statutes—One Act should not be used directly for interpreting another Act.**

It is not proper to use one Act directly for the purpose of interpreting another Act. [P 345 C 1]

* * (c) **Evidence Act (1872), S. 4—Presumptions—Presumptions are of two kinds—Of law and of fact—Both differentiated.**

Presumptions are of two kinds: presumptions of law and presumptions of fact. Presumptions of law are true presumptions, presumptions sometimes rebuttable, sometimes irrebuttable which Courts are bound by statute and sometimes by other binding authority to set up, positions which they are bound to take up beforehand, a priori, before they ever consider the evidence in the case or the part of the case to which the presumptions apply. Those presumptions are correctly called presumptions positions, which a Court must take up beforehand. It is a little unfortunate that in legal phraseology the word "presumptions" is used in what are spoken of as presumptions of fact. Presumptions of fact, are not necessarily taken up at the beginning of the consideration of a case or of any particular part of it. They are really assumptions of fact which a Court may make at any stage of a case. They are assumptions of fact for which Courts do not ask any proof. They are always assumptions or inferences of fact, based upon our ideas and experience of the course of nature, the course of human business and the course of human conduct. They are the assumptions and unconscious inferences of a reasonable man. There is no special magic about such presumptions or assumptions of fact as they are used in Courts of law, and no Full Bench however numerous, however distinguished, can lay down by ruling that Courts shall make certain inferences or assumptions of fact in future cases. A Judge may and must very often make use of assumptions of fact; but he must not use them in isolation; he must not shut his eyes to the facts disclosed in the evidence in the case which he is trying: (*Orise law referred.*) [P 345 C 2, P 346 C 1]

(d) Civil P. C. (1908), S. 100—Whether certain presumptions should be raised in certain circumstances or have been rebutted by certain circumstances are matters of fact to be decided by lower Courts—Practice, Duty of Court, Presumptions.

It cannot be said that even in the presence of other circumstances which go against any presumptions that the Court should draw from the circumstance, that the same state of things is shown to have continued for a long number of years, the presumption that there was a lawful origin for the same. The questions whether a presumption should be raised in the circumstances, and whether such a presumption has been rebutted by the other circumstances in the case or not are matters pre-eminently within the cognizance of the lower Courts which have to record findings of facts. [P 350 C 2]

P. Venkataramana Rao, K. S. Desikan and V. L. Narasimham—for Appellant.

K. Venkatarama Raju and V. Krishna Mohan—for Respondents.

Reilly, J.—This batch of appeals relates to suit for the acceptance of pattas in a village to which the Madras Estates Land Act applies. The plaintiff, the proprietrix, tendered certain pattas to the raiyats of the village. They objected to some of the terms, and she then launched these suits. The Deputy Collector who tried the suits, found that the terms of the pattas tendered were correct except in one respect, the exception being that a term was introduced in accordance with which the raiyat would pay on dry land if he grew cocoanuts on it, not the ordinary dry rate, but a much enhanced rate, namely, Rs. 125 a khathi, which is an area equal to about 17 acres. The Deputy Collector found that that term was not a proper one and struck it out of the draft pattas, confirming the pattas in other respects. The plaintiff appealed to the District Court, and the learned District Judge dismissed her appeals. She then came to this Court on second appeal, and Devadoss, J., again dismissed her appeals. The present appeals are against the decisions of Devadoss, J.

It appears that some of the cocoanut plantations now in existence, to which the plaintiff wishes to apply this enhanced rate of rent, were planted after the Estates Land Act came into force. For those plantations by reason of S. 13 (3), Estates Land Act, she is not entitled to claim any enhanced rent, if the plantations are improvements within the meaning of the Act. Under the Act the planting of fruit trees is an improvement, where it materially adds to the value of

the holding, is suited to the holding and is consistent with the character of the holding. There is no question in these cases that the planting of cocoanut trees in this village adds very greatly to the value of the holdings. That is no doubt why the plaintiff demands a higher rent for such holdings. There is no question that the planting is suitable to the land, which we are told is sandy land near the sea coast, and it is obviously consistent with the holdings of the raiyats. But it has been urged before us rather surprisingly as it appears to me, that the planting of cocoanut-trees is not an improvement within the meaning of the Act because cocoanut-trees are not fruit trees. Our attention has been drawn to a decision of two learned Judges of this Court in *Vellayappa Chetty v. Subramania Chettiar* (1), a case under the Madras Estates Land Act, in which they held that cocoanut trees were not fruit trees. Of the two learned Judges Wallace, J., appears to have held so with some assurance, and Devadoss, J., with hesitation, but undoubtedly they came to the conclusion that cocoanut trees were not fruit trees.

With the very greatest respect I find it impossible to agree with that decision. Devadoss, J., remarked that fruit trees mean trees producing edible fruit. For myself I should not be inclined to confine fruit trees to those trees alone which produce edible fruit. But if that is the test cocoanuts surely satisfy that test. All of us know that parts of cocoanuts are certainly edible. Now it is not for us to differ from the decision of another Bench when the same point comes before us; but in this particular matter I feel at liberty to differ from the learned Judges in the case I have mentioned. Although that is the only case reported, so far as I know, where the question whether cocoanut-trees are fruit trees within the meaning of the Estates Land Act is discussed, we are all aware that there have been hundreds of cases before this Court from another part of the Presidency, in which coconut trees have been invariably treated as fruit trees. Coconut trees are undoubtedly fruit trees for the purpose of the Malabar Compensation for Tenants' Improvements Act; and, though it is certainly not pro-

(1) A. I. R. 1927 Mad. 137=99 I. C. 559=50 Mad. 482.

Per to use one Act, directly for the purpose of interpreting another Act, for myself I see no reason why we should give different meanings to "fruit tress" in the Malabar Compensation for Tenants' Improvements Act and in the Madras Estates Land Act, nor why we should regard a coconut tree on the west coast of this Presidency as a fruit tree and something other than a fruit tree on the east coast of this Presidency. With greatest respect I feel that we are at liberty, being fortified by very many other decisions of this Court, too numerous to mention, to hold that a coconut tree is a fruit tree and that therefore the plantation of coconut trees in this village with which we are concerned is an improvement within the meaning of the Madras Estates Land Act. That being so, it is quite clear that in respect of those coconut plantations concerned in this group of suits which have been made after 1st July 1908 the plaintiff's suits must fail.

But, although we are told, and the evidence shows, that the plantation of coconuts in this village has extended greatly in recent years, there was a large extent of such plantations before the Estates Land Act came into force; and to those plantations, made before 1st July 1908, we cannot apply the same considerations. The evidence in this case shows that from 1881 onwards the proprietor of this village has taken muchilikas from the raiyats which have contained a condition that if they grow coconuts on the dry lands in their holdings, they will pay rent in accordance with the village rivaz or custom; and it has been found that whenever raiyats of the village since that time have planted cocoanuts on their dry land, they have not paid the dry rate on the land, but have paid approximately this very high rate which the plaintiff now claims. Mr. Venkata-ramana Rao, who appears for the plaintiff, has urged that on those findings of long continued payment of an enhanced rate on dry lands used for the planting of coconuts and of the regular insertion in the muchilikas of the clause I have mentioned, we ought to presume that there was a contract between the raiyats and the landholder, i. e., between the predecessors of the present raiyats and the predecessors of the plaintiff who only bought this village in 1915, that this high rate should be paid when coconuts are

planted and that we ought to presume that that was a legally enforceable contract supported by consideration. That presumption he urges we ought to set up, and the Judges of fact, who have dealt with the case, ought to have set up, as a presumption of fact. For that he relies upon the opinions of a Full Bench of this Court in *Peria Karuppa v. Raja Rajeswara Sethupathi* (2), where the majority of the Bench lay it down that a Court can presume a contract to pay a higher rate of rent than would otherwise be due and a legal origin and consideration therefor from long-continued payment of the higher rate in respect of a village to which this Act applies. And Mr. Venkata-ramana Rao has referred us to other cases where similar presumptions have been raised. Presumptions, as is well known, are of two kinds; presumptions of law and presumptions of fact, as they are called.

Presumptions of law are true presumptions, presumptions, sometimes rebuttable, sometimes irrebuttable, which Courts are bound by statute and sometimes by other binding authority to set up, positions which they are bound to take up beforehand, a-priori, before they ever consider the evidence in the case or the part of the case to which the presumptions apply. Those presumptions are correctly called presumptions, positions which we must take up beforehand. I think it is a little unfortunate that in our legal phraseology we also use the word "presumptions" in what are spoken of as presumptions of fact. Presumptions of fact are not necessarily taken up at the beginning of the consideration of a case or of any particular part of it. They are really assumptions of fact which we may make at any stage of a case. They are assumptions of fact for which we do not ask any proof. Every hour of our life we are making such assumptions of fact in the course of our reasoning on all sorts of questions; we make them from our childhood to our death. Life would not be long enough for the ordinary affairs of business if we did not make such assumptions. Simple questions of fact which a Judge has to decide without the aid of such assumptions would take him months or years to dispose of. These presumptions or assumptions in a very large number of cases we make unconsciously or

(2) [1919] 42 Mad. 475=50 I.C. 616.

sub-consciously by an elliptical form of reasoning. But they are always assumptions or inferences of fact, based upon our ideas and experience of the course of nature the course of human business and the course of human conduct. They are the assumptions and unconscious inferences of a reasonable man. There is no special magic about such presumptions or assumptions of fact as they are used in Courts of law ; and that makes it to my mind rather surprising that questions about such presumptions have on occasions been referred to Full Benches for statements of general opinion about them. For myself with very great respect I do not understand how the question in *Peria Karuppa v. Raja Rajeswara Sethupathi* (2) ever came to be referred to a Full Bench.

And no Full Bench, however numerous, however distinguished, can lay down by ruling that Courts shall make certain inferences or assumptions of fact in future cases. I think, if the opinions of the learned Judges in that case are read carefully, it will be seen that they were all embarrassed by the question which was put to them. But, though no Judge can lay down for another Judge of fact what inferences of fact he shall draw or what assumption of fact he shall make on the way to those inferences, it is often of interest and instruction to observe how other Judges have made use of such assumptions. The most instructive part of the opinions in *Peria Karuppa v. Raja Rajeswara Sethupathi* (2) is I think the insistence of every Judge forming that Bench that the presumptions of fact which they were discussing would always have to be considered, if they were to be made, in relation to the facts of the special case, as disclosed in the evidence of that case, to which they might be applied ; and that is really I think very near the heart of the matter. My learned brother also laid stress upon that when discussing the question in *Shivaramayya v. Raja of Venkatagiri*, A. I. R. 1930 Mad. 339. A Judge may and must very often make use of such assumptions of fact ; but he must not use them in isolation ; he must not shut his eyes to the facts disclosed in the evidence in the case which he is trying. If a Judge is charging a jury about the proper use to be made of such a presumption or assumption of fact, it is his duty

to warn them that they must only make use of that presumption or assumption if they think it reasonable in all the circumstances of the case. And a Judge sitting alone as a Judge of fact must apply that direction to himself. Therefore it is of no use, I think, for Mr. Venkataramana Rao to bombard us with decisions that presumptions or assumptions of fact of this sort can be used in such a case as this. No one can question that. The important question is whether the assumption he asks us to make ought to have been made considering all the facts which are disclosed in this case, or perhaps more strictly whether the refusal of the Judges of fact in this case to set up that presumption, considering all the special facts of the case, is so obviously wrong or unreasonable that we ought to interfere with it or that Devadoss, J. ought to have interfered with it in second appeal.

Now what are the special facts which we know about this case ? The raiyats of the village, the evidence shows, have paid this specially high rate on dry land instead of ordinary dry rates on the land, if they have grown coconuts on that land, for 35 years before the suits were brought, and for the same period they have all signed muchilikas agreeing to pay according to the village rivaz, if they should grow coconuts on this dry land. In some instances they have paid this high rate for more than 35 years because they have grown coconuts on their land for longer periods. In 1916 and 1917 some suits were brought by the late proprietor of this village against the raiyats to enforce this high rate of rent, and he succeeded, the suits being allowed to go ex parte. Ex. Y shows that much earlier than that, in 1893, this high rate was recovered in a contested suit ; and in that case the District Munsif referred to the fact that the defendants had entered into an agreement to pay this high rate as long ago as 1863. Among the evidence three pattas of 1868 have been produced (Exs. 8, 22, and 23) in which this clause that the raiyat will pay for coconut plantations as the customary village rate is entered. Those are all manuscript pattas. In 1872, 1875, 1878 and 1879, we have instances of printed pattas in which this clause about the payment of a higher rate according to the village custom when coconuts are grown is added in manuscript. These

take the practice of demanding and paying this higher rate in certain instances much further back than 1881. But it is also to be noticed that in 1868 there was one patta, Ex. 3, in which nothing whatever was said about coconuts or paying any higher rate when they were grown. Now that certainly is evidence that there was some agreement between the raiyats concerned, and after 1881 apparently between the raiyats of the village generally and the proprietor to pay this largely enhanced rate when coconuts were grown on dry land. But that does not carry the plaintiff far enough. What the plaintiff has to prove is not only an agreement but a legally enforceable contract, an agreement supported by consideration. Mr. Venkata-rama Rao for the plaintiff urges that we ought to assume, as the evidence takes us so far back, that the agreement between the raiyats and the landholder was supported by consideration. If we were quite certain that the two parties—the zamindar or proprietor and the raiyats—had been negotiating on equal terms, at arm's length, I am not sure that the facts which I have mentioned might not properly lead us to infer that the agreement must have been supported by some consideration. But I am also not sure that I should always be ready to make such an inference when the parties are the zamindar or proprietor on the one side and the raiyats of a village on the other. I think it not improbable that, if a search were made through the records of this Court, it would be found that those Judges who have had experience of the mofussil have been the least ready to assume as a matter of course that zamindars and proprietors on the one side and the raiyats of a village on the other have negotiated on equal terms. But we need not go further with such speculation as there are in this case other facts to be considered.

The plaintiff has not been able to assist us by suggesting what the consideration can have been for the agreement to pay this largely enhanced rent when coconuts are grown. Now that we are in this sphere of presumptions or assumptions of fact we must ask ourselves whether we can assume that there was consideration, not by a mere effort of the imagination, but taking properly into account the course of nature and human

conduct. What can this consideration have been? What can we suppose it to have been? It is very difficult I think to imagine what it was. It was suggested at one stage that in this village rents were originally adjusted on the sharing system. It is very likely that that was so a great many years ago. And the suggestion was that, if rents were adjusted on the sharing system and afterwards that was changed to a money system, the proprietor might have agreed to that change on condition that, when any raiyat planted coconuts and obtained such valuable produce from the land, he would then pay a higher money rent than he would otherwise pay. But the difficulty in this case is that there is no way on the evidence of relating any change from a sharing system to a money rent system with the origin of this agreement to pay a higher rate for coconuts, so far as we can see. The finding in this case—and it is supported by the evidence of two of the plaintiff's own witnesses, who have been karnams of the village—is that for dry land the system of money rent has been in force for very many years, long before the earliest date to which the evidence regarding this agreement to pay higher rent for coconut plantations relates at all.

So there is no ground, so far as the evidence goes, for supposing that there was any connexion between the origin of this agreement to pay higher rate for coconuts and the change from a sharing system to a money rent system, so far as the dry lands of the village are concerned. Nor is there any evidence to show that any particular raiyats among those who are defendants in this group of cases were admitted to their holdings after this practice of paying a higher rent for coconut plantations had come into force, so that it might be said that in their cases at any rate there were contracts with the landholder when they were admitted originally to their holdings to pay this rate. If that were so, it might be easy to infer that there was consideration in their cases. But the evidence as put before us is not to that effect. As I have mentioned, coconut plantation has spread in the village gradually more and more as holders of dry land have planted their land or part of it with coconut trees. But it is not suggested that there have been successive contracts under

which raiyats have taken to cocoanut growing. What is suggested for the plaintiff is a contract made many years ago that they would hold their land on the ordinary dry rates with a proviso that if they grew coconut trees at any future time, they would pay the higher rate, and it is for that supposed contract that we have to find by evidence or inference or assumption some consideration.

If we had evidence that, when cocoanut trees were planted, during the years before they came to bearing, the proprietor did not claim any rent or claimed only a very much reduced rent, then we might find consideration for the agreement that he should receive a very much enhanced rent after the coconut trees came to bearing. There is no evidence of that in the present case. On the contrary there is evidence that the raiyats have been required to pay during the years before the coconut trees have come to bearing the full dry rates upon their land, although for those years they were getting no profit from it at all. That is very much against the suggestion that there must have been consideration for this agreement. Then we have another piece of evidence. In several of the early pattas, in which there is a reference to paying this high rate of rent for cocoanut plantations in accordance with the village custom, there is a provision that the raiyat shall not plant cocoanut trees without the proprietor's permission, i. e., he is prohibited from doing so of his own free will. As the learned District Judge has pointed out, that is a piece of evidence distinctly against the theory that there was consideration for this supposed contract.

Now, as I have said, these appeals before us arise out of second appeals. It is not of immediate interest what inference from the facts either my learned brother or I might have drawn if we had been Judges of fact in the matter. What we have to consider is whether the finding of the two Judges of fact in this case and especially of the learned District Judge, who was the final Judge of fact, that there was no valid consideration for this alleged contract is so unreasonable or so opposed to the evidence that we ought to upset it. I think after what I have said it is clear that we could not properly come to any such conclusion.

In my opinion these appeals should be dismissed with costs (advocate's fees Rs. 10 in each appeal in which vakalat or appearance has been filed).

Anantakrishna Ayyar, J.—I agree. The plaintiff-landholder of Chinnagolapalem filed these summary suits to enforce the acceptance of pattas and execution of muchilikas by the defendants who are the raiyats of the said village. The main dispute between the parties turned on the question whether the landholder was entitled to claim a higher rate of rent when the raiyats grow cocoanut trees on their holdings. The Revenue Officer who tried these suits, as well as the learned District Judge on appeal, disallowed the claim of the landholder to charge the higher rate. The second appeals preferred by her to this Court were dismissed by Devadoss, J. These Letters Patent Appeals have accordingly been preferred by the plaintiff against the decision of the learned Judge.

The case of the landholder is that a contract between the parties to pay the higher rate must be presumed, having regard to their conduct during the last about 50 years. At one stage it seems to have been suggested in the lower Court that the claim was based on usage. When the defendants wanted to have more particulars about the nature of the claim put forward by the landholder, the landholder expressly stated that the claim was based on contract. When the arguments in these Letters Patent Appeals began, the question arose whether having regard to the provisions of S. 13, sub-S. 3, Estates Land Act, the landholder would be entitled to claim the higher rate in respect of cocoanut trees planted after the Act came into force. The learned advocate for the landholder, the appellant before us, argued that that provision would not apply to these cases because, he urged, that the planting of cocoanut trees could not be said to be an "improvement" within the meaning of the Act, and consequently sub-Cl. 3, S. 13, would not apply to the present case. In support of this argument the learned advocate relied on the decision of this Court reported in *Vellayappachetti v. Subramania Chettiar* (1). It is true that the learned Judges in that case have expressed the opinion that the planting of cocoanut trees is not "an improvement" within the meaning of the

Estates Land Act. As that raised an important question, we were anxious to consider the matter carefully before giving a decision upon that point. I may state here that Devadoss, J., who was a member of the Bench which decided the case reported in *Vellayappa Chetti v. Subramania Chettiar* (1), decided the second appeals from which these Letters Patent Appeals have been preferred. In his judgment in the present case this is what the learned Judge says at p. 81 of the pleadings book:

"I do not think that in the case of fruit trees like cocoanut, Batavia oranges, and other trees which come to maturity 7, 10 or 15 years after they are planted, the word "crop," as ordinarily understood by landlords and tenants, could be applied to such a plantation. The planting of cocoanut trees is an improvement within the meaning of the Act."

The learned Judge also treats the cocoanut trees as, "fruit trees" in the course of his judgment. I do not see from the report in *Vellayappa Chetti v. Subramania Chettiar* (1) that the attention of the learned Judge was drawn to this decision in the present case when he was considering the case in *Vellayappa Chetti v. Subramania Chettiar* (1). Ordinarily we should be inclined to follow the decision of a Bench of this Court; but on examining the judgment delivered by the learned Judges on that occasion we feel that the question has not been sufficiently discussed in that case. The decision was based on the definition of the word "improvement" in S. 3, Cl. 4 of the Act, under which improvement includes (sub-Cl. F) "the planting of fruit trees and fruit gardens". Reading the provisions of the Act, it is not clear that the fruit trees mentioned therein should necessarily be trees that yield fruits edible by human beings. It is known that there are trees which yield fruits which are eaten by cattle. I am in the first place not at all clear that the definition of the term "improvement" in the Estates Land Act excludes trees the fruits of which are not edible by human beings or cattle. Even assuming for the purpose of argument that edibility by human beings is the test I have no doubt that even that test is satisfied in the case of cocoanuts. Cocoanut trees are so very common in several parts of this Presidency that practically everybody knows about the use of the cocoanut trees and of fruits thereof but it may be as well to refer to

a few books in the circumstances. I find that in Dr. Maclean's Manual of the Administration of the Madras Presidency Vol. 3, at pp. 195 and 197, there is an interesting article on "cocoanut trees". At p. 197, I find the following:

"In its young and green state the cocoanut contains a clear albuminous fluid with a sweetish taste and a slight degree of astringency. But as the nut advances to its full maturity the fluid disappears and the hollow is filled by the almondlike dried albumen which is the germinating organ. This pulp or kernel when young, can be easily removed by a spoon. It is used greatly in curries or its milk is expressed from it." . . . "The milk extracted by pressure from fresh kernel is used in curries and confectionery."

When tested by one's knowledge of what is going on in several parts of the Presidency regarding the use made of cocoanuts in "culinary preparations" (though the kernel is also occasionally eaten raw), one cannot at all say that the description in the above book errs on the side of exaggeration. As is well known, the tract along the west coast of this Presidency is very favourable to the growth of cocoanut trees, and the attention of earlier writers was naturally drawn to this subject. In the book entitled "the Land of Perumauls-or Cochin its Past and its Present" by Francis Day, printed in 1863, I find an interesting description of the cocoanut tree and its uses. At p. 537 the following passages are quoted from "Oriental Memoirs Vol. 1, p. 12, by Forbes:

"Of all the trees which Providence has bestowed on the Oriental world, the cocoanut tree most deserves attention. In this single production of nature what blessings are conveyed to man. It produces clusters of green fruit. The nuts contain a delicious milk and a kernel sweet as an almond; this when dried affords abundance of oil, and when it is expressed the remains feed cattle and poultry and make a good manure The Asiatic celebrated either in verse or prose the three hundred and sixty uses to which the trunk the branches, the leaves, the juice and the fruit were skilfully applied. Many of the trees are not permitted to bear fruit but (are) made to yield a cool liquid called toddy, the palm wine of the poets."

In a book called "Note of Agricultural Facts and Figures," published in 1920 by Mr R. Cecil Wood of the Madras Agricultural Department there is the following observation at p. 163:

"In the south the tapping of cocoanut trees is very common, but in the north it is entirely absent."

Even a casual observer of what happens in Hindu marriages and other festivities, and also in temple festivals could not have failed to note the part played

by cocoanut fruits in the same. It is remarked at p. 197 of Maclean's Manual, Vol 3, that "cocoanuts are hourly broken and offered to the native deities." (Though called cocoanuts, it is not denied that they are fruits and Devadoss, J, in his judgment in the present case treats cocoanut trees as "fruit" trees), I do not think it necessary in the circumstances to say more about the use made of cocoanuts in various parts of this Presidency. In the definition of the word "improvement" in the Malabar Compensation for Tenants' Improvements Act, the words "fruit trees" occur and it has been held all along by the Courts that cocoanut trees are fruit trees and compensation has been awarded all along on the footing that the planting of cocoanut is an improvement. If cocoanut trees are "fruit trees" in the western parts of this Presidency, there is no reason why they should cease to be so in the other portions of the Presidency. It goes without saying that several owners of cocoanut plantations near habitations do often allow the use of the trees for tapping toddy, when it pays them more to do so. But that circumstance by itself would not be sufficient to justify us in saying that the cocoanut tree is not a fruit tree within the meaning of the Estates Land Act. That the planting of cocoanut trees adds to the value of the holding is also clear from the conduct of plaintiff in the present case, because she claims a higher rate of rent on the footing that the raiyats make more money out of these trees. I would therefore respectfully dissent from the decision in *Vellayappa Chetti v. Subramania Chettiar* (1) in this respect and hold that the planting of cocoanut trees comes within the definition of the term "improvement," under the Madras Estates Act.

I do not propose to say much on the other question that was argued, viz., with reference to the landholder's right to charge higher rate in respect of cocoanut trees planted prior to the Estates Land Act. The strongest point in favour of the plaintiff landholder—is that the raiyats have been paying the increased rate for about 50 years. What is the exact weight to be attached to this circumstance would depend upon the question whether there are in the present case other circumstances which point the

other way. I do not understand any reported decision to lay down broadly that even in the presence of other circumstances which go against any presumptions that the Court would ordinarily be inclined to draw from the circumstance that the same state of things is shown to have continued for a long number of years, that the Court is bound to raise the presumption that there was a lawful origin for the same. As I have said, the questions whether a presumption should be raised in the circumstances, and whether such a presumption has been rebutted by the other circumstances in the case or not, are matters pre-eminently within the cognizance of the Courts below which have to record findings of facts. In this particular case, I find there are some circumstances which prima facie would seem to point in the other direction.

It is admitted on behalf of the plaintiff that taram rates prevail in the village, and that the same have been fixed with reference to the quality of the soil. Prima facie, therefore when a landholder claims rates higher than the taram rates, the onus is upon him to show how he is entitled to such higher rates. In these cases, there is the further circumstance that in some of the pattas the condition is inserted that without the sanction of the landholder the raiyats are not entitled to plant cocoanut trees. If there be such a usage as is contended for or as has been the plaintiff's case latterly if there was a contract between the parties that the raiyats would be entitled to plant cocoanut trees but should only pay a higher rate of Rs. 125 per khatti (about 17 acres) then how could the landholder consistently with such a contract, stipulate in the pattas that without the landholder's sanction the raiyats should not plant cocoanut trees. Again, there is an admission by one of the plaintiff's witnesses that so long as the living memory of man goes, there has been no "assura" or sharing system prevailing in the suit village. There is also the evidence that the landholder is entitled to recover from the raiyats the taram rates — (taram dry rates)—during the period between the planting of the cocoanut trees and their coming to bearing. If the contract was that the landholder should not have any rent at all in respect of the land on which the cocoanut trees are planted till the trees came to

bearing, but that when the trees begin to yield fruits the landholder is to have a higher rate, one can understand the position, but that is not so here.

It is also remarked by the learned District Judge that the rates charged were different in respect of different holdings relating to cocoanut trees. In short, various circumstances are mentioned in the judgment of the learned District Judge, which he was entitled to consider along with the other circumstance, viz., that the payment at higher rate has been made for 50 years. Sitting in second appeal, and having regard to the circumstances mentioned above—this does not seem to be a case in which we would be entitled to interfere with the finding arrived at by the lower appellate Court—I agree with my learned brother that these Letters Patent appeals should be dismissed with costs—the pleader's fee in each appeal in which vakalat or appearance has been filed, being fixed at Rs. 10.

P.R.S./B.V. *Appeals dismissed.*

A. I. R. 1932 Madras 351

WALLER AND JACKSON, JJ.

(Jayanti) Bhagvanula Narasimham—
Defendant—Appellant.

v.

(Jayanti) Venkatasubbamma (dead) and
others—Plaintiffs—Respondents.

Second Appeal No. 2214 of 1927, Decided on 3rd December 1931, against decree of Sub-Judge, Bezwada, in A. S. No. 101 of 1926.

Hindu Law — Maintenance — Widow —
Widow of co-parcener suing for maintenance after partition—She can enforce her right only against those co-parceners who have taken her husband's share.

When the widow of a co-parcener sues for maintenance after there has been a partition, she cannot enforce her right against any of the surviving co-parceners except those who have taken her husband's share. If her right to relief against the family property is limited to the value of her husband's share, and that share has already been defined and separated it would be idle to give her relief against any of the co-parceners other than those who have succeeded to that share; no other share is liable. If the value of her claim is less than that share, there is no reason why any other share should be resorted to. If it exceeds it, no other share is chargeable for the excess: 35 Mad. 147; A. I. R. 1927 Mad. 1189; 28 I.C. 349, Ref.; 27 Mad. 45, Rel. on.; 5 M.H.C.R. 377 and A. I. R. 1914 Mad. 226, Dist. [P 352 C 1]

V. Ramadoss—for Appellant.

P. Satyanaraya Rao, K. Subba Rao
and P. Somasundaram—for Respondents.

Waller, J—The plaintiff who is respondent 1 in this second appeal, is the widow of one Narasimham. He died about 30 years before the suit and she adopted respondent 2, one of the sons of her husband's brother Kakulayya. In 1919 a suit for partition was brought and the family property was divided. Respondent 2 and his sons got a $\frac{3}{8}$ ths share the other three branches, now represented by the appellant and by various respondents, being allotted the remaining $\frac{5}{8}$ ths. In 1924 respondent 1 filed a suit for maintenance, impleading all the former coparceners as defendants. The suit was defended only by respondent 2 and his sons (defendants 1, 2 and 3). Defendants 5, 7, 9, and 11 appeared by a pleader, but filed no written statements and the rest of the defendants did not appear at all. In the result respondent 1, was given a decree for certain sums of money, $\frac{3}{8}$ ths of which were to be paid by respondent 2, and his sons and the other $\frac{5}{8}$ ths by the other three branches, the District Munsif observing that the pleaders on both sides had agreed "to the division of the liability in accordance with the shares of the different sets of the defendants." The plaintiff lodged an appeal, claiming a higher rate of maintenance and defendants 8 to 11 a memorandum of objections, pleading that they should not have been made liable at all. Defendants 4 to 7 appeared by a pleader but filed no memorandum of objections. The Subordinate Judge enhanced the rate of maintenance and at the same time dismissed the memorandum of objections, holding that the plaintiff's right to maintenance out of the entire family property was not affected by the partition. Defendant 8 has now filed a second appeal, putting forward the same plea, that the plaintiff's claim for maintenance was sustainable only against the share allotted to the first three defendants as representing her husband. We have been referred to no decision that bears directly on the question at issue. The Subordinate Judge relied on two cases of this Court. One was *Subbarayulu Chetty v. Kamalavalli Thayaramma* (1), where it was held that a widow's right to maintenance was enforceable against the whole family and

(1) [1912] 35 Mad. 147=10 I.C. 347.

not merely against her late husband's branch of it and that her right would not be affected by a suit for partition filed after her suit for maintenance; in other words her claim was to be treated as that of a widow of a member of an undivided family. To that rule Mr. Y. Ramadoss for the appellant takes no exception, his argument being that it does not apply to a case like this, where the suit for maintenance was brought after the partition. The other decision, which is referred to in *Subbarayulu Chetty v. Kamalavalli Thayaramma* (1), is *Jayanti Subbiah v. Alamelu Mangamma* (2). It laid down that the widow of an undivided co-parcener had a right of maintenance against the surviving co-parcener or co-parceners, but only to the extent of her husband's share or interest in the joint family property and that, wherever it becomes necessary to enforce her right, it should be made a specific charge on a reasonable portion of that property, not exceeding in value her husband's share. In *Subbarayulu Chetty v. Kamalavalli Thayaramma* (1), this view of the law was accepted, the Judge observing:

"It may be that a decree would not be enforceable against a member of a joint family which gave something more than the interest of the deceased husband which passed by survivorship to the surviving members."

If this be the correct rule and we must accept it as correct it seems to us to follow that, when the widow of a co-parcener sues for maintenance after there has been a partition, she cannot enforce her right against any of the surviving co-parceners except those who have taken her husband's share. If her right to relief against the family property is limited to the value of her husband's share and that share has already been defined and separated, it would be idle to give her relief against any of the co-parceners other than those who have succeeded to that share; no other share is liable. If the value of her claim is less than that share, there is no reason why any other share should be resorted to. If it exceeds it, no other share is chargeable for the excess. Several other cases were cited for the respondents. Two of them *Sivananjanja Perumal v. Meenakshi Ammal* (3) and *Srinivasa Iyengar v. Thiruveng-*

gadathaiyangar (4), do not really touch the point. In the first the only coparceners were the widow's sons and stepson, the latter of whom contended that his stepbrothers' divided share alone was liable and it was that contention that was overruled. The second was a similar case in which a similar contention was put forward and rejected. In another case, *Karuppa v. Chinna Nallammal*, A. I. R. 1927 Mad. 1189, a Bench of this Court followed the ruling in *Jayanti Subbiah v. Alamelu Mangamma* (2), holding that if a widow's right to maintenance was limited to the value of her husband's interest in the joint property, her maintenance might reasonably be charged against that interest alone. No doubt, in the result the Judges gave a charge over the whole property, but that was because another maintenance holder had a prior charge over the whole, which might have been utilized to defeat a subsequent charge over a part of it. Another case cited *Bala Tirupura Sundaramma v. Suryanarayana* (5), resembles and follows the *Sivananjanja Perumal v. Meenakshi Ammal* (3).

We are of opinion that the appeal must be allowed. A memorandum of objections has been filed by respondents 5 and 7, supporting the appellant. It must, we think be allowed under O. 41, R. 33. In view of the course taken by the case in the Courts below, they and the appellant will pay their own costs. The first three defendants will pay the whole decree amount and respondent 1's costs throughout and she will pay the fee due to the Government.

P.R.S./B.V. *Appeal allowed.*

(4) A. I. R. 1914 Mad. 226=38 Mad. 556=23 I.C. 264.

(5) [1915] 28 I.C. 349.

* * A. I. R. 1932 Madras 352

REILLY AND ANANTAKRISHNA
AYYAR, JJ.

Gangjee Premjee & Co.—Petitioner.

v.
O. L. K. K. N. Firm, Colombo and
others—Opposite Parties.

Civil Revn. Petn. No. 1434 of 1930,
Decided on 25th November 1931, against
order of Dist. Court, Ramnad, D/- 17th
September 1930.

(a) Limitation Act (1908), S. 5—S. 5, Limitation Act, and S. 78, Insolvency Act, must be

(2) [1904] 27 Mad. 45.

(3) [1869] 5 M.H.C.R. 377.

strictly construed—Provincial Insolvency Act (1920), S. 78.

Section 5, Limitation Act, is in itself an exception to S. 3 of that Act, which directs that suits, appeals and applications presented after expiry of the periods of limitation prescribed shall be dismissed, and being a provision enacting an exception to a general rule it has to be strictly construed. And in the same way S. 78, Provincial Insolvency Act, so far as it applies to S. 5, Limitation Act, must also be strictly construed.

[P 354 C 1]

(b) Limitation Act (1908), S. 5—"Applications" include "petitions"—Interpretation of Statutes.

Petitions, so far as they are governed by the Limitation Act, are included in the word "applications." And speaking generally in regard to the Acts applicable to India, it is impossible to say that there is any necessary distinction between an application to a Court and a petition to a Court.

[P 354 C 1]

* * (c) Provincial Insolvency Act (1920)—Interpretation—"Petition" and "application" connote different things—Interpretation of Statutes.

In the use of the words "application" and "petition," in the Act there is a very definite distinction drawn between them. The word "petitions" is used for either a debtor's or a creditor's insolvency petition, praying that the debtor may be adjudged insolvent, but is never used for any application to the Court in the course of insolvency proceedings already instituted. That petition should be used for applications praying that a debtor may be adjudged insolvent, which thereby institute insolvency proceedings, and that all applications in pending insolvency proceedings should be described in the Act as applications appear to have been a deliberate choice of language. And the use of the word "petition" in the new S. 54 (A) is not sufficient to destroy the strong contrast maintained through the Act as originally framed between a "petition" praying that a debtor be adjudged insolvent and other applications made in the course of insolvency proceedings. The legislature had a purpose in the use of the words "petition" and "application" in the material sections of the Provincial Insolvency Act, and it is not open to Courts, in the absence of clear and cogent indications in the Act to the contrary to ignore the distinction made by the legislature.

[P 354 C 2]

* (d) Provincial Insolvency Act (1920), S. 9 (1) (c)—S. 9 does not explicitly lay down any rule of limitation but in effect it does so.

Section 9 (1) (c) does not lay down any explicit rule of limitation. It does not say that if the petition is not filed within a certain period it shall be dismissed. In form and in language it does lay down certain conditions precedent. But although in form what one finds in the section is a statement of conditions precedent and not a rule of limitation, in effect it is very much the same thing as a rule of limitation, namely, that unless a creditor files his petition within three months after the act of insolvency it must be dismissed, which has just the effect of a rule of limitation : *A. I. R. 1923 Mad. 462, Ref.*

[P 357 C 1]

* (e) Provincial Insolvency Act (1920), Ss. 9 and 78—Creditor's application under

S. 9—S. 5, Limitation Act, does not apply—Limitation Act (1908), S. 5.

The provisions of S. 5, Limitation Act, cannot be applied to the case of a creditor's petition under S. 9, Insolvency Act, because such a petition is not an application within the meaning of S. 78 of the latter Act.

[P 356 C 2]

The legislature has in the Act used the expressions "petitions" and "applications" for different purposes and with different legal significations. Therefore power to excuse the delay in respect of "applications" given under S. 78 of the Act, by reference to S. 5, Limitation Act, is not applicable to excuse delay in filing a "creditor's petition" under S. 9, Insolvency Act : *A. I. R. 1932 Mad. 112, Foll. ; A. I. R. 1932 Cal. 160, Ref. ; (Mad.) C. M. A. 523 of 1925, Expl.*

[P 360 C 2]

K. Rajah Ayyar and V. Ramaswami Ayyar—for Petitioner.

B. Sitarama Rao, S. R. Muthuswamy Ayyar and S. Panchapagesa Iyer—for Opposite Parties.

Reilly, J.—This civil revision petition relates to a creditors' insolvency petition presented to the Subordinate Judge of Ramnad. That petition alleged a preferential transfer as the act of insolvency necessary to support it ; but the date of the transfer, according to the document representing it, was more than three months before the date on which the insolvency petition was presented. So with their insolvency petition the creditors presented a petition to excuse the delay under S. 5, Lim. Act. That petition the Subordinate Judge dismissed. On appeal the District Judge, feeling himself bound by the decision of a Bench of this Court in *A. A. O. No. 523 of 1925*, held that S. 5, Lim. Act, applied to the case and reversed the Subordinate Judge's order and remanded the petition to excuse the delay for fresh disposal. The present civil revision petition is preferred by the transferee concerned against the District Judge's remand order.

It was decided by a Full Bench of this Court in *Lingayya v. Chinna Narayana* (1), before the present Provincial Insolvency Act of 1920 came into force, that S. 5 and other general provisions of the Limitation Act did not apply to insolvency petitions. When the present Provincial Insolvency Act was enacted, a new provision was introduced in S. 78 of the Act, the opening words of which are :

"The provisions of Ss. 5 and 12, Limitation Act 1908, shall apply to appeals and applications under this Act."

It is contended for the petitioning creditors in this case that under that

(1) [1918] 41 Mad. 169 = 41 I. C. 805.

provision S. 5, Lim. Act, can be applied to their petition for the adjudication of the debtor. It will be noticed that the new provision in S. 78, Provincial Insolvency Act, relates to appeals and applications only, as indeed does S. 5, Lim. Act. The petitioner before us, the transferee concerned, contends that a creditor's insolvency petition praying that a debtor may be adjudged insolvent is not an application within the meaning of S. 78, Provincial Insolvency Act. In considering that question I think in the first place we have to remember that S. 5, Lim. Act is in itself an exception to S. 3 of that Act, which directs that suits, appeals and applications presented after the expiry of the periods of limitation prescribed shall be dismissed, and being a provision enacting an exception to a general rule it has to be strictly construed. And in the same way S. 78, Provincial Insolvency Act, so far as it applies to S. 5, Lim. Act, must also be strictly construed. Remembering that, does the word "application" in S. 78, Provincial Insolvency Act, include insolvency petitions, i. e., petitions praying that a debtor may be adjudged insolvent?

Speaking generally, I do not think we can say that in legal phraseology a petition is not an application. Mr. Sitarama Rao for the creditors has pointed out to us that the words are in legislation applicable to this country often interchangeable. In the Limitation Act it must be noticed that there is no reference to petitions at all, although it cannot be supposed that there is no law of limitation applicable to petitions. Petitions, so far as they are governed by the Limitation Act, are included in the word "applications." Ss. 8, 9 and 10, Guardians and Wards Act, show that an "application" may be a petition. Under S. 8 the Court may be moved to appoint a guardian by an "application" and under S. 10 the "application" may be made by a "petition." And, what is perhaps even more interesting for our purpose as Mr. Sitaram Rao has been able to point out, in S. 55, Civil P. C. the expression "apply to be adjudged an insolvent" appears in sub-Ss. (3) and (4). Therefore, speaking generally in regard to the Acts applicable to this country, I think it is impossible to say that there is any necessary distinction between an application to a Court and a petition to a Court. For the con-

venience of the organization of Court records and general administration there are certain rules in force in this Presidency that the term "petition" shall be used for what may be called originating motions, either in execution or otherwise, and that the term "application" shall be used for motions made in pending proceedings. But in this Court itself that rule is not strictly followed. On the appellate side of the Court it is not followed at all, as we ordinarily call interlocutory applications in pending proceedings civil miscellaneous petitions.

But Mr. Rajah Ayyar for the petitioner here urges that, whatever may be the general practice either in Courts or in legislation in the use of these words, "application" and "petition," in the Provincial Insolvency Act there is a very definite distinction drawn between them. He has been able to show us that in the Provincial Insolvency Act, 1920, as it was enacted, "petition" is used for either a debtor's or a creditor's insolvency petition, praying that the debtor may be adjudged insolvent, but is never used for any application to the Court in the course of insolvency proceedings already instituted. That "petition" should be used for applications praying that a debtor may be adjudged insolvent, which thereby institute insolvency proceedings, and that all applications in pending insolvency proceedings should be described in the Act as "applications" appears to have been a deliberate choice of language. It becomes particularly remarkable when we look at Ss. 10 (2) and (52), in both of which the word "petition" and the word "application" occur, "petition" being reserved as elsewhere in the Act for a petition that the debtor be adjudged insolvent. Those two sections emphasize what appears to be a deliberate contrast in the use of the two words. In S. 6 (f) there is a small point which may be noticed. It is there stated that a debtor commits an act of insolvency if he "petitions" to be adjudged an insolvent. "Petitions" is an awkward and ugly word, not likely to have been used in place of the ordinary word "applies," unless there was some special reason for using it. And the reason appears to be that even in that statement the legislature wished to maintain the distinction between a "petition" and an "application," which runs right through the rest of the Act.

That was the position in regard to the use of these words, as the Act stood when it was first enacted. It happens however that in 1926 a new section, 54 (A) was introduced in order to allow a creditor to prosecute a petition to have a transfer set aside under S. 53 or S. 54 of the Act if Official Receiver declines to do so. In that new section the opening words are:

"A petition for the annulment of any transfer under S. 53, or of any transfer, payment, obligation or judicial proceeding under S. 54.

There we have for the first time in this Act the use of the word "petition" for something other than a petition that the debtor may be adjudged insolvent. The contrast between such a petition for adjudication and any other application to the Court, which had been maintained so far by the use of the two different words "petition" and "application," was infringed when this amendment was introduced. Mr. Sitarama Rao for the creditors not unnaturally contends that the contrast on which Mr. Rajah Ayyar has based his argument here breaks down. It is a remarkable fact that "petition" was introduced in that way in the new section. But I think we must remember that what we are trying to do now is to interpret the word "application" as it appears in S. 78 of that Act. S. 78 of the Act was there when the Act was originally issued in 1920, and the fact that there was the marked contrast between the use of the word "petition" and the use of the word "application" when the Act was issued in 1920 is not destroyed by a different use of the word "petition" in the amendment introduced six years later. It has also been suggested by Mr. Rajah Ayyar that the word "petition" may have crept into this new amendment by oversight, the legislature not remembering, when the amendment was made, that in this particular Act a distinction had been drawn between the use of the word "petition" and the use of the word "application." But I do not think we are entitled to attribute oversight to the legislature unless that is clearly necessary. There are other explanations why a proceeding under S. 54 (A) of the Act, and so by implication a proceeding under S. 53 or S. 54, should be described as instituted by "petition" rather than by "application." If "petition" was reserved purposely by the legislature for some motion originating proceedings, then it

might well be used in connexion with proceedings under Ss. 53 and 54, as though connected with insolvency proceedings and possible only while insolvency proceedings are pending, they are really new proceedings originated against outside parties; and in that sense it is not inconsistent with the distinction which Mr. Rajah Ayyar wishes to draw between "petition" and "application" that such proceedings be initiated by "petitions." And it may also be remarked that for such proceedings, so long as insolvency proceedings are going on, there is no period of limitation, and therefore the legislature may even have used the word "petition" in S. 54 (A) advisedly, so as to make it clear that they are outside the scope of S. 78.

On the whole I do not think that the use of the word "petition" in the new S. 54 (A) is sufficient to destroy the strong contrast maintained through the Act as originally framed between a "petition" praying that a debtor be adjudged insolvent and other applications made in the course of insolvency proceedings.

So much for the mere words used. But there may well be, as Mr. Rajah Ayyar suggests, good reason behind the choice of the word "application" rather than "petition" in S. 78. According to the scheme of the Act a petition praying that a debtor be adjudged insolvent initiates very important litigation. By S. 12 of the Act it is required that such a petition shall be signed and verified as if it were a plaint. And under S. 18 of the Act it is provided that the procedure in regard to the admission of plaints shall be applied to such petitions. Those two sections recognize that an insolvency petition, praying that a debtor be adjudged insolvent, is not only the beginning of very important litigation but is of as much importance as a plaint. Indeed, as we know, it may often be of much more importance than a plaint.

It may initiate something equal to a whole bundle of suits. If as appears from these provisions of the Act, the legislature intended an insolvency petition praying that a debtor be adjudged insolvent to be treated as a plaint in a suit, of as great importance as a plaint in a suit, then there would be good reason for using language which would make it clear that S. 5, Lim. Act, though being applied by

the new S. 78 to other matters in connexion with insolvency proceedings, that is, to appeals and applications, should not be applied to initiating insolvency petitions. S. 5, Lim. Act, as is well known, has no application to suits. It does not give the Court any power to extend the period of limitation for instituting a suit; but it does give the Court power on sufficient cause to extend the time for filing an appeal or an application in litigation which has already been properly instituted by suit. When a party has come to Court with his suit in time, then he or other parties to the suit, who are conducting their proceedings under the control of the Court, are allowed to ask for extension of time under S. 5, Lim. Act, for sufficient cause and the Court may grant such extensions at its discretion. But it is no part of the Limitation Act—indeed it is against the object of the Limitation Act—that the Court should have discretion to extend the period of limitation for initiating suits. If the Court had power to do that then one of the main objects of the law of limitation in giving security to titles would be defeated. And in the same way, if the Court had discretion to enlarge the time after an act of insolvency within which a creditor's insolvency petition must be filed, the security of many transactions might be imperilled.

The acts of insolvency which may be used as one of the justifications for a creditor's petition include even the sale of property in execution of a decree. If a debtor's property is sold in execution of a decree for three months after that is done, it is possible that a petition to adjudge him insolvent may be filed. But after that period other persons doing business with him know that that danger is gone. If the Court had discretion to extend that period of three months, very serious results to merchants and others dealing with a judgment-debtor might happen. It is therefore quite reasonable that as S. 5 is not applicable to suits so it should not be applicable to creditors' insolvency petitions.

However the learned District Judge as I have mentioned, felt that he was bound by the decision in A. A. O. No. 523 of 1925. And on that decision Mr. Sitarāma Rao has relied before us. In that case no doubt the two learned Judges were of opinion that S. 5 applied to a creditor's petition to adjudge a

debtor insolvent. The actual question before them was whether the refusal of the District Judge to apply S. 14, Lim. Act, to such a petition was proper. They were of opinion that S. 14, Lim. Act, did not apply to such an insolvency petition and they dismissed the appeal before them. But in the course of their judgment they expressed the opinion that S. 5, Lim. Act may be applied to such insolvency petitions though in the end they came to the conclusion that the circumstances of that case were not such as to justify the application of that section. I think that Mr. Rajah Ayyar is justified in saying that the expression of the learned Judges' opinion in that case to the effect that S. 5, Lim. Act, applies to a creditors' insolvency petition was obiter dictum. And I may perhaps also remark with great respect that in that case the learned Judges did not find it necessary to discuss the wording of the Provincial Insolvency Act in the provisions concerned nor did they note the contrast between the use of the word "petition" and the use of the word "application" which I have mentioned. And it may be added that this revision petition comes before us because it has been referred to a Bench by Jackson, J., who delivered the judgment in A. A. O. No. 523 of 1925 and who it appears therefore does not himself regard that as a binding decision on the present question. On the other hand Cornish, J., in *Vaithinatha Ayyar v. Vaithinatha Ayyar* (2) sitting alone decided that S. 5, Lim. Act, did not apply to a creditor's insolvency petition. In my opinion Cornish, J.'s view on that matter should be followed. I may add that it has been pointed out to us that the only specific provisions regarding limitation in the Provincial Insolvency Act are contained in S. 68, relating to applications against orders made by receivers and S. 75, relating to appeals. It has been suggested that that may explain why it was thought necessary in S. 78 to refer only to appeals and applications. That also is an argument which I think supports the view I have taken regarding S. 5, Lim. Act.

There was another part of Mr. Rajah Ayyar's argument with which I do not think I need deal in any detail on this occasion. He contended that S. 9 (1) (c),

(2) A. 1. R. 1932 Mad. 112=135 I. C. 613.

Provincial Insolvency Act, which provides that the act of insolvency on which the petition is grounded must have occurred within three months before the presentation of the petition does not prescribe any period of limitation within the meaning of S. 5, Lim. Act. If that is so of course any other discussion of the question is unnecessary. His argument is that S. 9 does not provide a period of limitation, but does by its wording provide a condition precedent which must be fulfilled before a creditor can prefer an insolvency petition. That section lays down that a creditor shall not be entitled to present an insolvency petition against a debtor unless the debt is Rs. 500, unless it is a liquidated sum and unless the act of insolvency has occurred within three months. Now in form that section undoubtedly does not lay down any explicit rule of limitation. It does not say that if the petition is not filed within a certain period it shall be dismissed.

In form and in language it does lay down three conditions precedent as Mr. Rajah Ayyar contends. And I may mention that Mr. Rajah Ayyar's view that this section does not provide a period of limitation was adopted by Spencer, J., in *Aiyapparaju v. Venkatakrishnayya* (3). But although in form what we find in the section is a statement of conditions precedent and not a rule of limitation as Mr. Sitarama Rao has pointed out in effect we get to very much the same thing as a rule of limitation, namely, that unless a creditor files his petition within three months after the act of insolvency it must be dismissed which has just the effect of a rule of limitation. But I do not regard this question whether S. 9, Provincial Insolvency Act does lay down a rule of limitation as at all an easy one and I do not wish to express any decided opinion upon it on this occasion. If we were to find that S. 9, Provincial Insolvency Act did not prescribe any period of limitation then very serious consequences would follow. Among other things S. 14, Lim. Act, would not affect such insolvency petitions by reason of S. 29, Lim. Act, as it might otherwise do. It is not necessary I think to go into this difficult question and its consequences on this occasion as all that we

are concerned with now is the question whether S. 5, Lim. Act, applies to a creditor's insolvency petition. And on that question I agree with Mr. Rajah Ayyar's contention that it does not apply.

In my opinion therefore this petition should be allowed with costs in this Court and the remand order of the learned District Judge should be set aside.

Anantakrishna Ayyar, J.—Certain creditors of a debtor filed a petition under the Provincial Insolvency Act to have the debtor adjudicated an insolvent on the ground that he had executed a mortgage in favour of some one creditor, alleging that the mortgage constituted a fraudulent preference under S. 54, Provincial Insolvency Act; but as the date mentioned in the mortgage deed was beyond three months from the date of the petition, the petitioners applied to have the delay excused under S. 5, Lim. Act, read with S. 78, Provincial Insolvency Act. The learned Subordinate Judge held that the Court had no jurisdiction to apply S. 5, Lim. Act, to petitions under the Insolvency Act. He accordingly dismissed the petition. On appeal by the petitioning creditors, the learned District Judge reversed that decision and remanded the petition for rehearing on the merits whether there was sufficient cause to excuse the delay. He relied on the decision of a Bench of this Court in *A. A. O. No. 523 of 1925* and (*Peddapalli Samacharlu v. Yerrajimi Siddappa*) and held that S. 5, Lim. Act, was applicable to a petition filed by a creditor under S. 9, Provincial Insolvency Act. The mortgagee has preferred this revision petition against the decision of the District Judge, under S. 75, Provincial Insolvency Act.

Mr. Rajah Ayyar, who appeared for the mortgagee, based his case on two grounds: (1) that S. 5, Lim. Act, does not apply to the petition in question; and (2), that the period of three months mentioned in S. 9, Provincial Insolvency Act, is not "a period of limitation" within the meaning of S. 5, Lim. Act, and consequently no question of limitation arises in the case, his contention being that after the expiry of three months, the transaction which would otherwise be available to ground the insolvency petition would not be available at all as such.

(3) A. I. R. 1923 Mad. 462=72 I. C. 488.

On the question whether S. 5, Lim. Act, applies to the present case, it may be stated that under the previous Provincial Insolvency Act 3 of 1907, it was held by a Full Bench of this Court in the case reported in *Lingayya v. Chinna Narayana* (1) that the general provisions of the Limitation Act dealing with the admission of appeals and applications filed after the periods prescribed for the same could not be applied to extend the periods prescribed by the provisions of Act 3 of 1907 for filing of appeals, etc. The view of the Full Bench was that the Insolvency Act was a special Act complete in itself, and that the general provisions of the Limitation Act could not be held applicable to proceedings taken under that Insolvency Act. After that decision, S. 78 has been enacted in the present Provincial Insolvency Act of 1920, to the effect that the provisions of Ss. 5 and 12, Lim. Act of 1908, shall apply to "appeals and applications under the Insolvency Act."

On behalf of the respondents, it was argued that the provisions of S. 5, Lim. Act, should now be held to apply to the "petition" filed by the creditors under S. 9, Provincial Insolvency Act. Mr. Rajah Ayyar contended that S. 78 applies only to "appeals" and "applications" under the Insolvency Act, and that a "petition" under S. 9 is not "an application" but "a petition" under the Act. At first sight it appeared to me that the petitioner before us was trying to make too much out of the use of the two different words "petitions" and "applications" in the Insolvency Act, and I was anxious to find out whether these words have any accepted definite legal signification, and whether the two words connote essentially different ideas. These words are not defined in the General Clauses Act, nor in the Code of Civil Procedure, the Limitation Act or in the Insolvency Act.

Referring to Wharton's Law Lexicon, I find the following:

"Application" is a request, a motion to a Court or Judge; the disposal of a thing."

As against "petitions" it is stated:

"A supplication made by an inferior to a superior having jurisdiction to grant redress."

It is further stated that

"in bankruptcy, proceedings are commenced by one or more creditors of the debtor filing a petition in the Court of bankruptcy praying that the debtor may be adjudged bankrupt. Divorce etc., proceedings are commenced by petition."

Mention is also made of election petitions. The "petitioning creditor" is said to be "one who applies for an adjudication in bankruptcy against his debtor." It was contended by the learned advocate for the respondents that the word "application" as used in the Insolvency Act, has no technical meaning and that it is the same as "petition" and he referred us to certain other enactments of the Indian legislature. In S. 55, Cls. 3 and 4, Civil P. C., it is stated that the Court, before whom a judgment-debtor, arrested in execution of a decree for money, is brought, shall inform him that he may "apply" to be declared insolvent. O 45, R. 2, relating to appeals to the Privy Council, was also referred to where the words used are "the appellant shall *apply* by *petition*." (The italics are mine). Further, the provisions of the Guardians and Wards Act, Ss. 8 and 10, were also referred to. In S. 10 it is mentioned that "if the application is not made by the Collector, it shall be by petition, signed and verified, etc."

It is not necessary to examine how these words are used in other enactments by the legislature, and whether each of these words has a definite well recognized meaning, different from the other. No doubt in the Civil Rules of Practice framed by this Court for the guidance of the lower Courts in the Presidency as to how proceedings should be marked for convenience and uniformity, a distinction has been made between a "petition and an application;" for example, between an "execution petition" and an "execution application," the latter phraseology being applied to the media by which further and other steps are sought to be taken in the main matter of execution and in a pending execution petition. But in construing an Act passed by the Indian legislature, this practice in our Presidency, should not be allowed to have any consideration at all. Again, as observed by the Privy Council in *Adamson v. Melbourne Metropolitan Board of Works* (4) at p. 147 when a word has no definite and well-understood legal signification:

"it is always unsatisfactory and generally unsafe to seek the meaning of words used in an Act of Parliament in the definition clauses of other statutes dealing with matters more or less cognate, even when enacted by the same legislature. A fortiori must it be so when resort is

(4) [1929] A. C. 142=98 L. J. P. C. 20=140 L. T. 107=45 T. L. R. 3.

had for this purpose to the enactments of other legislatures."

In the circumstances, it seems to me that we must therefore turn to the provisions of the Provincial Insolvency Act, 1920, to find out whether any light is thrown on this matter by the provisions contained therein. On a reading of the several sections of the Act, one thing is clear, that the legislature in this Act has used the words "petition" and "application" intentionally—prima facie differently. It is not necessary to refer to all the relevant sections. It is enough to refer among others to Ss. 7, 19, 20, 12 and 18, where the word "petition" is used; and to Ss. 27, 31, 35, 41, and 68, where the term "application" is used. We also find that the two terms are used—side by side—in each of the two Sections 10 (2) and 52 Sch. 1, also speaks of a "petition" and of an "application." I do not propose to lay any emphasis on the rules framed by this High Court under the Act, where the words "petition" and "application" are used separately: see Rr. 5, 8 and 14 etc. for example. The term "petition" is apparently used in the Act to denote that by which the proceeding is inaugurated and begun; whereas the term "application" is used to denote that by which intermediate steps are taken in connexion with an original proceeding. S. 18 enacts that the procedure laid down in the Civil Procedure Code with reference to admission of complaints shall, so far as it is applicable, be followed in the case of insolvency petitions; and S. 12 enacts that

"every insolvency petition shall be in writing and shall be signed and verified in the manner prescribed by the Civil Procedure Code for signing and verifying complaints."

Having regard to the use of these two terms "petition" and "application" differently in the various sections of the Act, I am led to think that the two words have been used purposely to denote two different matters, and that S. 78, Provincial Insolvency Act, which makes the provisions of S. 5, Limitation Act, applicable to "applications" under the Insolvency Act could not be called in aid in connexion with "petitions" under the Insolvency Act. Our attention was however drawn by the learned advocate for the respondents to the use of the word "petition" in S. 54 (A) which circumstance—he argued—is rather against this view. I am not sure that it is so. S. 54 (A)

was added by Act 39 of 1926. The distinction between "petition" and "application" existed when the Act was passed in 1920. For the purpose of this Act, that distinction does not disappear by the enactment of S. 54 (A), whatever light it may throw on the Act as a whole. It is possible that the word "petition" was used in connexion with S. 54 (A) purposely with a view to point out that proceedings contemplated under that section are to be treated as in the nature of original petitions and to be inquired into and tried accordingly, having regard to their importance and seeing that third parties are interested in the same; but, in any event, the use of the word "petition" in S. 54 (A) is not, in my opinion, in any way conclusive to show that the words "petition" and "application" have been used indiscriminately in the Provincial Insolvency Act.

It should be noted that S. 5, Limitation Act, does not apply to "complaints" but applies only to "appeals and applications." It is clear therefore that the Court has no power under S. 5 to excuse delay in the filing of a "complaint." In cases of minority, fraud, etc., the period of limitation is extended and it is provided that there would be no limitation bar under the provisions of the Act if the necessary deductions on ground of minority, fraud, etc. be made, whereas under S. 5, the Court excuses the delay having regard to the circumstances proved before it, holding that the proceedings are barred otherwise. Petitions filed by creditors under S. 9, Insolvency Act, are substantially in the nature of complaints. If that be so, one can understand why the legislature did not provide for the application of S. 5 to such petitions when it enacted S. 78 of the Act. Prima facie it would be strange that the Court which could not, under S. 5, excuse delay in filing a "complaint," could excuse delay in the filing of an "original petition," in respect of which, according to the assumption, a period of limitation has been prescribed. Thus, it would seem that the legislature had a purpose in the use of the words "petition" and "application" in the material sections of the Provincial Insolvency Act, and it is not open to Courts, in the absence of clear and cogent indications in the Act to the contrary, to ignore the distinction made by the legislature.

The learned advocate for the respondent relied on the decision of a Bench of this Court in C. M. A. No. 523 of 1925, decided by Devadoss and Jackson, JJ., the question for decision in that case was whether the petitioning creditor was entitled to the deduction of the time during which the petition filed by him was pending in a Munsif's Court, which had no jurisdiction to entertain that petition. While holding that S. 14 did not apply, the learned Judges were of opinion that S. 5 would apply, and holding that no sufficient cause for not making the application earlier had been shown, they dismissed the petition on the merits. That decision is entitled to great weight, and ordinarily, another Bench would follow the same. But reading the judgment of the learned Judges, it will be seen that the various provisions of the Insolvency Act where the words "petition" and "application" are used have not been noticed, nor does the judgment discuss the real nature of the creditors' petition. In fact, the judgment of the Court was delivered by the learned Judge, Jackson, J., and the same learned Judge before whom the present civil revision petition came on for hearing directed that the question should be considered by a Bench of two Judges. If the learned Judge thought that the decision in the unreported case referred to above governed the case and should be allowed, it was of course open to him to follow it, (as the lower appellate Court has done in the present case), and dismissed the revision petition. Instead of that, the learned Judge directed the case to be posted before a Bench, with a view, as I understand the position, to have the question of law re-examined by the Bench. In the circumstances, I do not think that it is not open to us to examine the question in the light of the further considerations placed before us.

Our attention was drawn to the case reported in *Vaithinatha Ayyar v. Vaithinatha Ayyar* (2), where Cornish, J., took the same view of these provisions of the Insolvency Act. The learned Judge held that the provisions of S. 5, Lim. Act, could not be applied to the case of a creditors' petition under S. 9, Insolvency Act, because such a petition "is not an application within the meaning of S. 78 of the Act of 1920." I respectfully agree. In my view, it is not necessary at present to examine the prior decisions of

the several Courts in India on the question whether the time taken in getting copy of decisions passed under the Insolvency Act, could be deducted in computing the period prescribed for an appeal under that Act. S. 78 has made the position clear, in cases arising under the new Act. It could not be said that there are no "applications" mentioned in the Provincial Insolvency Act, in respect of which periods of limitation have been fixed by the Act. It is enough to refer, for example, to S. 68 of the Act, which prescribes a period of 21 days in respect of "applications" mentioned therein. Having regard to the various provisions of the Provincial Insolvency Act, 1920, I think that it is a legitimate inference to draw that the legislature has, in that Act, used the expressions "petitions" and "applications" for different purposes and with different legal significations, and that, power to excuse the delay in respect of "applications," given under S. 78 of the Act, by reference to S. 5, Lim. Act, is not applicable to excuse delay in filing a creditors' "petition" under S. 9, Insolvency Act. The remarks of Lord Halsbury at p. 549 of *Commissioners for Special Purposes of Income-tax v. Pensel* (5) came to my mind, where the following passages occur:

"That, in fact, the language of an Act of Parliament may be founded on some mistakes, and that words may be clumsily used, I do not deny. But I do not think it is competent to any Court to proceed upon the assumption that the legislature has made a mistake. Whatever the real fact may be, I think a Court of law is bound to proceed upon the assumption that the legislature is an ideal person that does not make mistakes. It must be assumed that it has intended what it has said, and I think, any other view of the mode in which one must approach the interpretation of a statute, would give authority for an interpretation of the language of an Act of Parliament which would be attended with the most serious consequences."

I find that in *Upendranath Galowa v. Hemchandra Koley* (6), Suhrawardy and Graham, JJ., observed at p. 1390 (of 58 Cal.) as follows, and that in construing a fiscal enactment:

"Under Ch. 12, R. 3 of the Appellate Side Rules, a court-fee of Rs. 2 is prescribed for "swearing, affirming every affidavit," thus indicating that there is some difference between "swearing" and "affirming." It may be that solemn affirmation takes the form of an affidavit."

(5) [1891] A. C. 531=61 L. J. Q. B. 265=65 L. T. 21=55 J. P. 805.

(6) A. I. R. 1932 Cal. 160=135 I. C. 798=58 Cal. 1329.

However much I may feel that the difference, practically, between a "petition" and an "application" is rather too fine, I feel driven to the conclusion I have arrived at, by the use of these two expressions, in various sections of the Act in question. I may observe in passing that, so far as our attention was drawn, no such provision exists in the English Bankruptcy Act or in the Presidency Towns Insolvency Act. I may refer to Maxwell on Interpretation of Statutes, Ch. 12, S. 3, pp. 516 to 522, regarding the inference to be drawn when there is a change of language in a statute. In this view, it is not necessary to consider the second question raised by the learned advocate for the petitioner before us, viz., that the period of three months mentioned in S. 9 is not "a period of limitation" at all, but is only one of the factors which along with other factors mentioned in the section created a right in the creditor which he could enforce under the Act; that while limitation bar applies only to the rights that exist, S. 9 creates no right in the creditor unless the transaction relied on as constituting an act of insolvency took place within the period mentioned in that section, and as he contends, there being no right, no question of limitation arises. I do not propose to go into this question at present. In *Aiyaparaju v. Venkatakrishnayya* (3) though Spencer, J., was inclined to adopt that view, Venkatasubba Rao, J., preferred not to express any opinion on that point, as that learned Judge pointed out on the ground that "the question is a difficult one," and having regard to my opinion on the first of the two points mentioned above, it is not necessary for the disposal of the present revision petition to decide the second point. For the above reasons, I agree with my learned brother that the revision petition should be allowed with costs in the High Court only, and the Subordinate Judge's order restored. The order as to costs passed by the lower Courts, namely, that each party is to bear his own costs in each of those Courts, will stand.

P.R.S./B.V.

*Revision allowed.***A. I. R. 1932 Madras 361**

WALLER AND PANDALAI, JJ.

(Chintapenta) Narasimha Rao—Defendant—Appellant.

v.

(Chintapenta) Narasimham and others—Plaintiffs—Respondents.

Second Appeals Nos. 707 and 708 of 1928, Decided on 25th January 1932, against decrees of Sub-Judge, Amalapuram, in Appeal Suits Nos. 154 and 153 of 1924.

Hindu Law—Succession—Undivided sons succeed in preference to divided son.

On the death of a father leaving self-acquired property, his undivided sons succeed to such property to the exclusion of a divided son: 32 *Mad.* 377 and *A. I. R.* 1921 *Mad.* 168, *Expl.*; 22 *Bom.* 101; 49 *I. C.* 620 and *A. I. R.* 1930 *Oudh* 77, *Ref.* [P 462 C 2]

G. Lakshmanan and K. Ramamurthi—for Appellant.

T. Satyanarayana—for Respondents.

Waller, J.—Two questions arise in this second appeal. The first is whether Exs. 4 and 4 (a) evidence a partition between Sivaramayya and Seshayya, one of his three sons. As to that we see no reason to dissent from the conclusion arrived at by both of the Courts below that they do. The circumstances, it seems to us, indicate that it was the intention of both parties to enter into a complete separation of interest. The second question is whether, on the death of a father leaving self-acquired property, his undivided sons succeed to such property to the exclusion of a divided son. That question was answered in the affirmative in *Nana Tawker v. Ramachandra Tawker* (1). It has however been referred to a Bench for re-consideration on the grounds that some doubt has been thrown on the correctness of that decision in a later Madras case, and that it has been expressly dissented from by the Chief Court of Oudh. The later Madras case is *Vairavan Chettiar v. Srinivasa-chariar* (2). It dissents from *Nana Tawker v. Ramachandra Tawker* (1) on one point, no doubt, but it does not dissent from it on the material point as to the exclusion from inheritance to the father of divided by undivided sons. As Oldfield, J., observed, only the order of succession was then in dispute and not the nature of the succession. As to the order of succession, he thought—and the other

(1) [1909] 32 *Mad.* 377=2 *I. C.* 519.

(2) *A. I. R.* 1921 *Mad.* 168=62 *I. C.* 944=44 *Mad.* 499 (F.B.).

two Judges did not dissent from him—that *Nana Tawker v. Ramachandra Tawker* (1) was correctly decided. As to the nature of the succession however they thought that the earlier decision was incorrect. To put it briefly, they were of opinion that the succession was not by survivorship, but by inheritance. Mr. Lakshmanan argues that logically this leads to the conclusion that, as partition does not put an end to the right of inheritance, the divided son must succeed to the father's self-acquired property equally with the undivided son. The answer to his argument is that the divided son has ceased to be a member of the co-parcenary. This was pointed out by Mayne in his comments on a Bombay case, *Fakirappa v. Yellappa* (3), which is directly in point and against the appellants.

"A grandson" he observed, "sued his grandfather and uncles for a partition. He obtained a decree as to all the joint property, but failed as to a part which was held to be the separate property of the grandfather. On the death of the grandfather he brought a fresh suit for a share of this, contending that by descent it had become joint property. This was perfectly true, but the answer to the plaintiff was that he was no longer a member of the co-parcenary. On the grandfather's death his interest in the joint property passed to the remaining co-parceners by survivorship. His own separate property passed to his united sons as heirs and in their hands became an addition to the joint property, in which the divided grandson had no interest."

In other words, the separate property becomes part of the joint property in the hands of the heirs and, as a divided member no longer belongs to the co-parcenary and has no interest in its property, he can take no share in it. So far, then, the cases are all against the appellants. *Badri Nath v. Hardeo* (3), is the only decision contra. It dissents from *Fakirappa v. Yellappa* (4) and *Nana Tawker v. Ramachandra Tawker* (1) and follows *Kunwar Bahadur v. Madho Prasad* (5). It is impossible to understand how this last case can be treated as an authority on the question at issue. There was, no doubt, a dispute as to the right to succeed to a father's self-acquired property, but it was conceded that the sons, who were living apart from the father had not partitioned the joint property and severed themselves from him and the sons who

continued to live with him. That being so, it is obvious that the family remained joint and that the question now at issue could not have arisen. All that the Judges then said was this :

"if however we accept the finding of the Court below that the property was the self-acquired property of Asharfi, upon his death all his sons, including the defendants would be entitled and the mere fact that some of those sons continued to live in his house joint in food with him would not deprive the sons who were living away from him of their share in his estate."

In other words the mere fact of separate living did not operate as a division, and naturally the latter were equally entitled with the rest to succeed. It is a legitimate inference from the emphasis laid on the fact that there had been no partition, that, had there been a partition, the decision would have been in the opposite sense.

We find that *Nana Tawker v. Ramachandra Tawker* (1) was rightly decided as regards the order—though not as to the nature of succession in a case like this and dismiss the appeals with costs in Second Appeal No. 707 of the contesting respondent.

P.R.S./B.V. Appeals dismissed.

A. I. R. 1932 Madras 362

CURGENVEN, J.

Subbiah Kone—Petitioner.

v.

Kandaswami Kone—Opposite Party.

Criminal Revns. Nos. 417 and 418 of 1931 and Criminal Revn. Petns. Nos. 365 and 366 of 1931, Decided on 5th November 1931.

Criminal P. C. (1898), S. 403 (2)—Person can be convicted for any distinct offence for which separate charge might be framed, although he may be convicted or acquitted of another offence in same transaction—Madras Town Nuisances Act (1889), S. 3 (12).

Under S. 403 (2) a person can be tried for any distinct offence for which a separate charge might have been made against him under S. 235, notwithstanding that he may have been convicted or acquitted of another offence committed in the same transaction. [P 363 C 1]

A person can therefore be convicted under S. 323, I. P. O., and also under S. 3 (12), Madras Town Nuisances Act (1889), when although the act or series of acts constituting the two offences may be the same, they are capable of being viewed from entirely two different points of view, the former being an offence against an individual and the latter against the public: *A. I. R. 1925 All. 299* and *A. I. R. 1929 Bom. 451, Ref.*; *A. I. R. 1924 Mad. 478* and *A. I. R. 1927 Cal. 224, Dist.*; *A. I. R. 1926 Lah. 639* and *A. I. R. 1927 Bom. 629, Commented upon.*

[P 363 C 1, 2]

(3) A. I. R. 1930 Oudh 77=123 I. C. 861=5 Luck. 649.

(4) [1898] 22 Bom. 101.

(5) [1919] 49 I. C. 620.

V. Rathnam—for Petitioner.

Public Prosecutor—for Opposite Party.

Order.—The petitioner in these two cases has been convicted of causing hurt under S. 323, I. P. C., and in respect of the same conduct of being guilty of disorderly behaviour under S. 3 (12), Towns Nuisances Act. The point taken is that one or other of the convictions must be set aside because together they offend against S. 403, Criminal P. C. I think that this is taking an incorrect view of the application of that section. Under sub-S. (2), S. 403 a person can be tried for any distinct offence for which a separate charge might have been made against him under S. 235, notwithstanding that he may have been convicted or acquitted of another offence committed in the same transaction. Here, although the act or series of acts constituting the two offences may have been the same, they obviously are capable of being viewed from two entirely different points of view. The offence of hurt was an offence against an individual. The offence under the Town Nuisances Act was an offence against the public. It is not, indeed, even the case that precisely the same circumstances have to be considered in regard to the two cases, because under S. 3, Town Nuisances Act the occurrence must have taken place in some public street, road, thoroughfare or place of public resort in order that the offence may have been committed.

My attention has been drawn to several cases upon the construction of S. 403, Criminal P. C., but I do not feel disposed to depart from this view after examining them. In *Chinnappu Naidu, In re* (1) and *Alfred Laird v. Emperor* (2), there was only one substantial aspect from which the occurrence could be regarded, in the former case as constituting mischief and in the latter case as constituting an assault upon an individual. It is true that the learned Judge who decided *Fatteh Muhammad v. Emperor* (3), accepted as the test that the act was a single one. In that case a tree was cut down in a graveyard and one of the offences said to have been committed was under S. 297,

(1) A. I. R. 1924 Mad. 478=76 I. C. 708=25 Cr. L. J. 244.

(2) A. I. R. 1927 Cal. 224=99 I. C. 1033=28 Cr. L. J. 233.

(3) A. I. R. 1926 Lah. 639=96 I. C. 875=8 Lah. 52.

I. P. C., and another under S. 379. With all respect I think this was clearly an instance in which under S. 235, Criminal P. C., two charges might have been framed and two punishments awarded for the two separable offences committed. The case in *Emperor v. Kallasami* (4) was of a different character, because it related to two offences which were connected in the manner contemplated in S. 236, Criminal P. C., that is to say, where the commission of one or the other of them was doubtful. I cannot agree that the test proposed in that case, that the evidence should be the same in respect of the two offences, is a conclusive test, if it is to apply to cases of the kind now under reference. Much more nearly similar to the circumstances of the present cases are those of *Emperor v. Ram Sukh* (5) and *Dodhu Kalu, In re* (6). In both of those cases the offences fell under Ss. 323 and 160, I. P. C., and it was held that such offences were distinct and separable and that there was no bar to the trial of one by virtue of a conviction in respect of the other. In the same way in the present case I can find no bar to the trial of the one offence owing to the conviction in respect of the other, and I accordingly dismiss the criminal revision petitions.

P.R.S./R.K.

Petition dismissed.

(4) A. I. R. 1927 Bom. 629=106 I. C. 216=28 Cr. L. J. 1032.

(5) A. I. R. 1925 All. 299=86 I. C. 64=47 All. 284.

(6) A. I. R. 1929 Bom. 451=118 I. C. 693=1929 Cr. C. 510=30 Cr. L. J. 965.

* * A. I. R. 1932 Madras 363

Full Bench

WALLACE, WALLER AND PANDALAI, JJ.

The Registrar, High Court—Petitioner.
v.

Kodangi—Opposite Party.

Criminal Misc. Petn. No. 693 of 1930,
Decided on 20th October 1930.

* (a) Criminal P. C. (1898), S. 476—'In relation to,' meaning of, explained.

The fact that the trial was the effect of the complaint does not ipso facto bring all matters mentioned in the complaint 'in relation to' the trial, nor does it in fact bring any matters mentioned in the complaint into that relation except those which are relevant to the charge being tried in the trial itself. [P 367 C 2]

** (b) Criminal P. C. (1898) S. 476—
Charge to police against several individuals

—Only one charged before Court—Court has no jurisdiction to take action against complainant in respect of persons not charged—Mere fact of telegram charging all was exhibited does not make the matter “in relation to proceedings” — Penal Code (1860), S. 211.

When the charge is made by the complainant to the police against more than one individual, and the police while charging before the Court one or more of such individuals with the offence complained of do not charge them all, the Court has no jurisdiction to take action under S. 476, against the complainant in respect of those not so charged : (*Case law discussed*).

The mere fact of a telegram, containing a false report of the offence being exhibited and filed in the case does not make the contents of it a matter “in relation to the proceedings” in the Court, so as to give the Court jurisdiction to take action under S. 476, against the author of the telegram in respect of persons not charged before the Court, though named in the telegram as having committed the crime referred to therein.

[P 368 C 1]

The Public Prosecutor—for the Crown.

K. S. Jayarama Ayyar—for Opposite Party.

Order of Reference

Beasley, C. J. and Walsh, J. — On 19th October 1929 at about 6 p. m. or a little earlier a man named Tirumeni Servai was stabbed in the neck at Appantirupathi and died almost immediately. One Malayalam alias Veeranan Ambalam was tried for that offence in the Sessions Court of Madura, convicted of it and sentenced to transportation for life. It was clearly established that Tirumeni Servai was stabbed in a mantapam by the side of the road and this fact is of considerable importance. Shortly after 9 p. m. on the same day Kodangi alias Arunachalam Servai a nephew of the deceased sent a telegram to the District Superintendent of Police at Madura North. It is worded as follows :

“Self and Tirumeni Servai went to Alagarkoil Road, Alagapuri. Our enemies, Madar Moideen elder brother's son of Ottakundi Mohamed Gani's sister's son Raja Rowther, Anupanadhi Alagumalai Pillai, Vellayakundram Manthayan's son Malayalam, these four stabbed Tirumeni Servai. Tirumeni Servai lying unconscious on Appantirupathi road. Pray take immediate steps. Arunachalam Servai, Kilavadampoki Street.”

The fourth name mentioned in the telegram is that of the convicted man. This telegram was later on for obvious reasons treated as a false document and no charge was brought against the other three persons mentioned in the telegram. The only statement in the telegram that was true was that Tirumeni Servai had been stab-

bed by Malayalam. The evidence shows that the murder could not have taken place where the respondent in this petition stated in his telegram that it had. It clearly took place in the mantapam. The evidence also shows that the respondent who was P. W. 20 in the Sessions case was not present at the stabbing. It also clearly shows that the other three persons mentioned in the telegram did not stab the deceased. In the committing Magistrate's Court, the respondent admitted that the contents of the telegram were not true. This admission he repeated in the Sessions Court where the telegram was admitted in evidence. He explained that he got from P. W. 22 a message sent by means of a bus driver who was not a witness in the case giving a brief account of the occurrence and said that he thought that other enemies of the deceased besides Malayalam must have been involved and that therefore he dispatched that telegram. He admitted that he was in Madura at the time of the occurrence and therefore did not see anything of the stabbing. The police from the beginning treated the respondent's statement as deliberately false. The discovery of blood on the floor in the north-east corner of the mantapam and a lot of blood on the platform together with the evidence of some of the witnesses conclusively proved that the respondent's account was false. The convicted man filed Criminal Appeal No. 178 of 1930 against his conviction and the appeal came before the Criminal Bench as at present constituted. The appeal was dismissed but we took a very serious view of the conduct of the respondent and in our judgment made the following order:

“As the evidence in this case in our opinion clearly discloses conduct which renders P. W. 20 Kodangi alias Arunachalam Servai liable to criminal proceedings we direct that notice be served upon him calling upon him to show cause before us why a complaint charging him with an offence under S. 211, I. P.C., should not be made by us under S. 476, Criminal P. C. Notice returnable on 28th August 1930.”

On 4th September 1930 Mr. Jayarama Ayyar on behalf of the respondent appeared and contended that the Criminal Bench hearing the appeal was not competent to make any such order under S. 476, Criminal P. C. His contention was that the offence alleged to have been committed by the respondent, (namely, that with intent to cause injury to the persons falsely accused in the telegram and know

ing that there was no just or lawful ground for any such accusation, he falsely charged them with having committed the offence of murder) was not committed in or in relation to proceedings in the Sessions Court and subsequently in the appellate Court because the only person charged in the Sessions Court was Malayalam alias Veeranan Ambalam. He contends therefore that unless it is shown that the person or persons falsely accused are proceeded against in a Court and shown to have been falsely accused, S. 476, Criminal P. C., has no application. S. 211, I. P. C., is one of the sections set out in S. 195 (1) (b), Criminal P. C. The latter section says that no Court shall take cognizance of any offence punishable under any of the sections enumerated there—S. 211 is one of them and proceeds :

"When such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, except on the complaint in writing of such Court or of some other Court to which such Court is subordinate."

Therefore his argument was that as the alleged offence was not committed in or in relation to any proceeding in any Court, the High Court could not take cognizance of that offence and that the complaint in writing of such Court is only necessary when the offence has been committed in or in relation to any proceeding in a Court. In support of his argument several cases were referred to by him. The first of these was *Muhammada v. Emperor* (1). In that case the petitioner made a report at the Police Station, Ferozepore, that he was in the Ferozepore hospital on a certain night attending on his sister who was an indoor patient there when one Nihal Singh came into the compound with a takwa in his hand intending to murder his sister, that Nihal Singh was accompanied by Roshan Beg and Ahmad Din, who were the expectant heirs of his sister and who had instigated him to commit the crime and that he was able to catch Nihal Singh, his companions having run away. The police after inquiry found that the story he had given was false. They took no action against Raushan Beg or Ahmad Din but charged Nihal Singh under the Arms Act for being in possession of the takwa. He was however acquitted. Raushan Beg then lodged a complaint under

S. 211, I. P. C., against Muhammada for having made a false charge against him. Muhammada was tried by the First Class Magistrate, Ferozepore, and found guilty under that section and sentenced to undergo rigorous imprisonment for four months and to pay a fine of Rs. 100. His appeal to the Sessions Court being unsuccessful, he preferred a revision to the High Court and the case came up before Sir Shadi Lal, C. J., and Aga Haidar, J., on reference by a single Judge. The Division Bench held that Cl. (1) (b), S. 195, Criminal P. C., did not apply to the prosecution of the accused by Raushan Beg under S. 211, I. P. C., the offence alleged thereunder not having been committed "in or in relation to any proceedings in any Court" within the meaning of the clause. On p. 417 (of 9 *Lah.*) it is stated :

"Raushan Beg was never charged in any Court, nor was he ever put upon his trial before any Magistrate, nor were any proceedings taken against him before the Court in which Nihal Singh was involved. This being so, it cannot be said that the offence under S. 211, I. P. C., with which Muhammada, the applicant, had been charged was an offence which was committed in or in relation to any proceeding in Court. This being our view, it was not necessary that the present prosecution should have been initiated on the complaint in writing of the Magistrate who tried and disposed of Nihal Singh's case. Under these circumstances the objection as to the maintainability of the present complaint fails."

In the course of the judgment reference was also made to some other cases and in particular to *Emperor v. Hardwar Pal* (2), where a contrary view to that taken by the Division Bench of the Lahore High Court was taken. There Hardwar Pal made a report against several persons including one Sher Bahadur Singh at a police station charging them with rioting and voluntarily causing hurt. The police made inquiry and sent up several persons for trial but not Sher Bahadur Singh. Some of these were convicted by the Magistrate but acquitted by the Sessions Judge. Thereupon Sher Bahadur Singh made a complaint to the Magistrate charging Hardwar Pal with having made a false report in respect of himself to the police. The Magistrate took cognizance of the complaint but it was held that the Magistrate had no power to take cognizance of the complaint by reason of the absence of sanction. Con-

(1) A. I. R. 1928 Lah. 259 = 109 I. C. 685 = 9 Lah. 408.

(2) [1912] 34 All. 522 = 13 Cr. L. J. 702 = 16 I. C. 510.

siderable doubt as to the correctness of this decision was thrown by two learned Judges of the same High Court in *Emperor v. Kashi Ram* (3). In that case it was held that there was no necessity for sanction for the prosecution of the person charged, and it was held that if the complainant confines himself to reporting what he knows of the facts, stating his suspicions, and leaving the matter to be further investigated by the police or leaving the police to take such course as they think right in the performance of their duty, he may be making a report but he is not making a charge. But if he takes the further step, without waiting for any further investigation, of definitely alleging his belief in the guilt of a specified person and his desire that the specified person be proceeded against in Court, that act of his, whether verbal or written, if made to an officer of the law authorized to initiate proceedings based upon the complainant's statement, whether amounting to an expression of the complainant's belief in the guilt of the specified person or his desire that Court proceedings be taken against him, amounts to making a charge. The Court held that under S. 195 (1) (b), Criminal P. C., a complaint of the Court was not necessary because the charge was not in a Court. In *Tayebulla v. Emperor* (4), a false charge was made by a person to the police and it was held that no sanction was necessary under S. 195 (1) (b), Criminal P. C., to prosecute an informant under S. 211, I. P. C., but that sanction would be required if he subsequently preferred a complaint to the Magistrate praying for judicial investigation, and, it was held that having laid information before the police and not having subsequently applied to the Magistrate for an investigation or impugned the correctness of the police report and prayed for a trial, he had not made a "complaint" within the meaning of S. 4 (h) of the Code.

Another case referred to by Mr. Jayarama Ayyar was *Brown v. Ananda Lal Mallik* (5). There it was held that where on information to the police is followed by a complaint to the Court based on the same allegations and the

same charge and such complaint has been investigated by the Court, the sanction or complaint of the Court itself is necessary even for a prosecution of the informant under S. 211, I. P. C., in respect of the false charge made to the police. Sanderson, C. J., in the course of his judgment referred to *Emperor v. Hardwar Pal* (2), but did not express any opinion as to the correctness of that judgment because the judgment in that case went a great deal further than the facts in the case then before the Calcutta Bench. A case on the other side following *Emperor v. Hardwar Pal* (2) is reported in *Emperor v. Gurditta* (6), a decision of a single Judge. There the accused made a report to the police against seven persons, five of whom were sent up for trial in a Magistrate's Court and the other two were not sent up and the charge against the accused was that he had brought a false case against them. The Public Prosecutor filed a complaint against the accused to that effect and the latter was committed for trial by the Magistrate. It was held that the offence under S. 211, I. P. C., if any, committed by the accused, was committed by him in relation to a proceeding in Court, and that as the sanction of the Court was not obtained and there was no complaint by it, the Committing Magistrate had no power to take cognizance of the offence.

In *Daroga Gope v. Emperor* (7), the Court had to consider what offences may be said to have been committed in relation to the proceedings in a Court within the meaning of S. 195 (1) (b), Criminal P. C. There the petitioner laid a false charge before the police which caused the police to submit a report against the petitioner which in its turn caused the petitioner to institute a judicial proceeding before the Magistrate by lodging a formal complaint and repeating the allegations made in his information to the police, and the Magistrate on the written complaint of the Sub-Inspector of Police summoned the petitioner under Ss. 211 and 182, I. P. C., and it was held that the laying of the false information before the police was an offence committed in relation to a judicial proceeding and the Magistrate had no jurisdiction to summon the peti-

(3) A. I. R. 1924 All. 779=82 I. C. 167=25 Cr. L. J. 1239=46 All. 906.

(4) [1916] 43 Cal. 1152=18 Cr. L. J. 13=36 I. C. 845.

(5) [1917] 44 Cal. 650=18 Cr. L. J. 25=36 I. C. 857.

(6) [1917] 19 P. R. 1917=18 Cr. L. J. 548=39 I. C. 692.

(7) A. I. R. 1925 Pat. 717=88 I. C. 1045=26 Cr. L. J. 1269=5 Pat. 33.

tioner under S. 211, I. P. C., without a complaint made in writing by the Court under S. 195 (1) (b). In this case *Emperor v. Hardwar Pal* (2), and *Brown v. Ananda Lal* (5) were considered.

As it appears to us that conflicting views have been taken in the cases referred to, we consider it necessary to refer the following questions to a Full Bench:

(1) "When a charge is made by a complainant to the police against more than one individual and the police while charging before the Court one or more of such individuals of the offence complained of, do not charge them all, is a complaint of the Court under S. 476, Criminal P. C., necessary to prosecute the complainant under S. 211, I. P. C., in respect of the person or persons whom the police have not charged before the Court.

(2) If the answer is in the negative, is such a complaint under S. 476, Criminal P. C., required on the particular facts of this case, owing to the complaint telegram having been exhibited and filed for the prosecution."

This petition coming on for hearing, in pursuance of the above order, and the said order of reference, and upon hearing the arguments of Mr. K. N. Ganapathi for the Public Prosecutor on behalf of the Crown and of Mr. K. S. Jayarama Ayyar and Mr. G. Gopalaswami, advocate for the respondent, and the petition having stood over for consideration, the Court expressed the following:

Opinion

Wallace, J.—The two questions referred to the Full Bench are; when a charge is made by a complainant to the police against more than one individual, and the police, while charging before the Court one or more of such individuals of the offence complained of, do not charge them all, is a complaint of the Court under S. 476, Criminal P. C., necessary to prosecute the complainant under S. 211, I. P. C., in respect of the person or persons whom the police have not charged before the Court; second, if the answer is in the negative, is such a complaint under S. 476, Criminal P. C., required on the particular facts of this case owing to the complaint telegram having been exhibited and filed for the prosecution? What question 1 is intended to cover is whether in the circumstances stated the Court had jurisdiction or was competent to act under S. 476. It is unnecessary to go more into detail into the facts. Question No. 1 sufficiently sets out the necessary data.

Under S. 476 the Court only gets juris-

diction to inquire and make a complaint under S. 211, I. P. C., if the offence under S. 211 appears to have been "committed in or in relation to any proceeding in any Court." Here there is no question of an offence having been committed in the Court, and the point is whether the words "in relation to any proceeding in any Court" are wide enough to cover the case stated. The "false" complaint was in a telegram to the District Superintendent of Police charging four persons with stabbing another. The police investigated and charged only one of these four with the stabbing and the trial of that charge is the relevant "proceeding" in the Court, as the charge of stabbing against the other three was not brought before the Court and did not properly form the subject-matter of any inquiry or trial before the Court.

The combined effect of Ss. 195 (b) and 476 is restrictive. In so far as the matter to be dealt with under the various sections mentioned in S. 195 (b) is in relation to a proceeding in a Court, the unrestricted authority of the police to arrest for and charge a cognizable offence is taken away. In a case under S. 211, when the police or the complainant or anyone else brings the charge, which is the subject-matter of the offence, to trial in a Court, then it may be fairly contended that the offence has been committed in relation to a proceeding in the Court. But where neither the complainant nor the police nor anyone else brings it into Court, we can see no sound reason why the Court should interpret Ss. 195 and 476 so as to hamper the otherwise unrestricted right of anyone to complain direct of the offence under S. 211. We do not think that the fact that the trial was the effect of the complaint ipso facto brings all matters mentioned in the complaint "in relation to" the trial, or in fact brings any matters mentioned in the complaint into that relation except those which are relevant to the charge being tried in the trial itself. It is not difficult to conceive of cases where false matters might be stated in a complaint to the police but are not made matter of charge or trial because they were wholly separable from the subject of the proceeding in Court and have no real relation to it. Judicial action taken solemnly by the Court under S. 476 should be confined to cases in which the observa-

tion of the Court itself or an inquiry or trial ad hoc has brought the offence to notice.

Not many rulings on the point are cited before us. Those that assist are *Muhammada v. Emperor* (1), *Emperor v. Hardwar Pal* (2) and *Emperor v. Kashi Ram* (3). The earliest of these is *Emperor v. Hardwar Pal* (2) which is to the effect that, in a case like the present, under the old S. 195, the sanction of the Court would be necessary. In *Emperor v. Kashi Ram* (3) the referring Judge doubted the correctness of *Emperor v. Hardwar Pal* (2) and went further, holding that a complaint not made to the Court could not retrospectively be regarded as in relation to a proceeding in the Court, merely because it had subsequently come to be tried by the Court. The Bench agreed with him so far as to hold that a charge made against one person and others will not amount to a charge against him in relation to a proceeding in Court simply because the others were brought to trial. This was followed by a Bench in Lahore in *Muhammada v. Emperor* (1). The ruling in *Tayebulla v. Emperor* (4), which the Bench in Lahore follows, would indicate that the Calcutta Court holds that it is only in so far as the police or the complainant himself had brought the complaint to the stage of a judicial inquiry or trial that S. 476 will apply. That is on the lines of the Lahore and later Allahabad rulings. We find ourselves in agreement with these views. We would therefore answer the first question that when the charge is made by the complainant to the police against more than one individual, and the police while charging before the Court one or more of such individuals with the offence complained of, do not charge them all, the Court has no jurisdiction to take action under S. 476 against the complainant in respect of those not so charged.

As to question 2, we are agreed that the mere fact of the telegram being exhibited and filed in the case does not make the contents of it a matter "in relation to the proceeding" in the Court, so as to give the Court jurisdiction to take action under S. 476.

P.R.S./K.N.

Answer accordingly.

* A. I. R. 1932 Madras 368

SUNDARAM CHETTY, J.

Gadagamma Venkatapathi — Petitioner.

v.

Baliarsimhuni Sanyasiraju and others — Opposite Parties.

Criminal Revn. No. 893 of 1931, (Case Referred No. 60 of 1931) Decided on 27th January 1932.

(a) Criminal P. C. (1898), S. 145 (1) — **Magistrate must state in writing grounds of his being satisfied that there is likelihood of breach of peace on account of dispute**

It is obligatory on the Magistrate under S. 145 (1) to state in writing the grounds for his being satisfied that on account of the dispute in respect of lands there is a likelihood of a breach of peace. On passing such order in writing he should require the parties concerned in such a dispute to attend his Court and put in written statements as regards their respective claims as regards the actual possession of the subject of dispute. [P 369 C 1]

(b) Criminal P. C. (1898), S. 148 (1) — **Magistrate ought not to depute subordinate Magistrate for making entire investigation and thus avoid necessity of taking oral evidence.**

A Subdivisional Magistrate under the guise of calling for report under S. 148 (1) ought not to depute the Subordinate Magistrate for making the entire investigation and avoid the necessity of taking any oral evidence which the parties may wish to adduce in support of their respective claims. [P 369 C 1]

(c) Criminal P. C. (1898), Ss. 145 and 148 (1) — **Inquiry should relate to question of actual possession.**

The inquiry under S. 145 (4) should relate to the question of actual possession and not to the question of right to possession. [P 369 C 1 2.]

(d) Criminal P. C. (1898), S. 145 (4) — **Order passed by Magistrate without taking any evidence himself and depending solely on report by Subordinate Magistrate is one passed without jurisdiction.**

A Magistrate holding an inquiry as to possession under S. 145, Cl. (4) is bound to take the evidence himself and cannot delegate to a Subordinate Magistrate the duty of taking such evidence and any order passed by the Magistrate without himself taking any evidence and depending solely upon the report of the Subordinate Magistrate is one passed without jurisdiction: 31 Mad. 82, Foll. [P 369 C 2]

Public Prosecutor — for the Crown.

G. Ranga Rao for *B. Jagannadha Das* — for Petitioner.

S. Subramania Sastri — for Opposite Parties.

Order.—This is a reference by the Sessions Judge of Vizagapatam with a recommendation that the order of the Subdivisional Magistrate, Parvatipur, under S. 145, Criminal P. C., dated 30th June 1931 may be quashed as illegal and

passed without jurisdiction. The facts of the case which led up to this reference have been clearly set forth in the order of the learned Sessions Judge. In view of those facts, I need hardly state that the whole procedure adopted by the Subdivisional Magistrate is vitiated by the irregularities pointed out by the Sessions Judge. S. 145, Cl. 1, makes it obligatory on the Magistrate to state in writing the grounds for his being satisfied that on account of the dispute in respect of lands there is a likelihood of a breach of the peace. On passing such an order in writing he should require the parties concerned in such dispute to attend his Court and to put in written statements of their respective claims as regards the fact of actual possession of the subject of dispute. The further steps to be taken in connexion with a petition put in under S. 145 are also set forth in the other clauses of this section.

In the present case the learned Subdivisional Magistrate seems to have overlooked the provisions of Cl. 1 of the section as regards the preliminary order to be passed by him. Not only did he omit to observe these conditions but he seems to have completely transferred the function of making the investigation into the dispute to a Subordinate Magistrate whom he directed to make a local inquiry and submit a report. S. 148, Cl. 1 of the Code enables the Subdivisional Magistrate to direct a Subordinate Magistrate to make a local inquiry and furnish him with a report for his guidance in the trial of the petition. But under the guise of calling for such a report he ought not to depute the Subordinate Magistrate for making the entire investigation and avoid the necessity of taking any oral evidence which the parties may wish to adduce in support of their respective claims. What the learned Subdivisional Magistrate has done in this case seems to my mind to be an abuse of the power conferred on him by S. 148, Cl. 1. It is clear from the final order of the Subdivisional Magistrate passed on 30th June 1931, that he made no inquiry whatever after the receipt of the report from the Subordinate Magistrate. The order is to say the least perfunctory and there is no finding as to the vital point to be considered by the Subdivisional Magistrate in a proceeding like this. The inquiry

should relate to the question of actual possession and not to the question of right to possession. There is no clear finding in the order of the Subdivisional Magistrate as to which party was in actual possession about the time of the receipt of information by him as to the existence of a dispute which was likely to cause a breach of the peace. It has been held in a decision of this High Court reported in *Arumuga Govindan v. Venkatasubbier* (1) that a Magistrate holding an inquiry as to possession under S. 145, Cl. 4, Criminal P. C., is bound to take the evidence himself and cannot delegate to a Subordinate Magistrate the duty of recording such evidence. Any order passed by him without himself taking any evidence and depending solely on the report of the Subordinate Magistrate should be deemed to be one passed without jurisdiction, on the authority of the aforesaid decision. I fully endorse the remark of the learned Sessions Judge that the conduct of the Subdivisional Magistrate in dealing with the present case under S. 145, Criminal P. C., is altogether unsatisfactory. I fail to see how the learned Subdivisional Magistrate omitted to observe the fundamental requisites laid down for a proceeding under S. 145 of the Code and how he thought fit to shirk his own responsibility in the matter and shelve it to a Subordinate Magistrate. The order passed by the Subdivisional Magistrate is manifestly wrong and is one made without jurisdiction. It is accordingly set aside and his proceedings are quashed.

P.R.S./R.M. *Order set aside.*

(1) [1908] 31 Mad. 82=6 Cr. L. J. 384=17 M. L. J. 535.

* * A. I. R. 1932 Madras 369 Full Bench

WALLER, PANDALAI AND
CURGENVEN, JJ.

Ponnuswami Goundan and another—
—Accused—Petitioners.

v.

Emperor—Opposite Party.
Criminal Misc. Petn. No. 324 of 1931,
Decided on 8th October 1931.

(a) Interpretation of Statutes—Code should be interpreted as it stands.

The Court should interpret a Code as it stands and not in the light of any anomaly to which its wording may give rise. [P 371 C 1]

** (b) Criminal P.C. (1898), S. 403, Explanation—Difference between S. 403 and S. 147 of Code of 1872 is only of language

and not of substance—Complaint dismissed under S. 203—Dismissal not set aside—Subsequent complaint can be entertained.

The difference between S. 147 of the Code of 1872 and S. 403 of the Code of 1898 is one merely of language and not at all of substance. That the dismissal of a former complaint is a bar to further proceedings until it is set aside is not a proper inference that should be drawn from the language of S. 403. The only meaning that can be put on the explanation to that section is that an order dismissing a complaint is not an acquittal, in the sense that it bars a further inquiry until it has been set aside.

A complaint having been dismissed by a Sub-divisional Magistrate under S. 203, Criminal P.C., a Sub-Magistrate has jurisdiction to entertain a charge sheet founded on a subsequent complaint although the previous order of dismissal has not been set aside : 29 *Mad.* 126, *Foll.* [P 371 C 1,2]

K. S. Jayarama Ayyar and *A. Venkatakrishna Ayyar*—for Petitioners.

Public Prosecutor—for the Crown.

Order of Reference

Waller and Pandalai, JJ.—We think that the question raised in this case should be decided by a Full Bench. It is this : whether a complaint having been dismissed by a Sub-divisional Magistrate under S. 203, Criminal P. C., a Sub-Magistrate has jurisdiction to entertain a charge sheet founded on a subsequent complaint, the order of dismissal not having been set aside. The ruling in *Emperor v. Chinna Kalia ppa* (1) is limited expressly to the case of the same Magistrate re-entertaining a complaint. *Mahomed Abdul Mennan v. Panduranga Row* (2), is a case of different Magistrates, though the head-note states the decision in wider terms : see *Girish Chunder Roy v. Dwarkadoss Agarwallah* (3) and *Queen-Empress v. Adam Khan* (4). But the decisions are not uniform ; vide *In re Mahadev Laxman*, *A. I. R.* 1925 *Bom.* 258. It is desirable, though a case of this kind must be of very rare occurrence, that the question should be authoritatively settled. We therefore refer the above question for decision by a Full Bench.

Opinion.—The petitioners are two out of five persons who have been charge-sheeted by the police before the Sub-Magistrate of Perundurai for offences under Ss. 419 and 467, I. P. C., and S. 82, Registration Act. A sale-deed had been presented for registration to the

Sub-Registrar of Kunnathur on 12th January this year. It purported to have been executed by one Kanni Moopan and by his mother on behalf of his minor brother and was registered the next day. On 28th January Kanni Moopan complained to the Sub-Registrar that he had not executed the deed and that there had been false personation. The Sub-Registrar forwarded his complaint to the District Registrar, who on 2nd February directed the Sub-Registrar to advise Kanni Moopan to complain to a Magistrate. The next day, somewhat inconsistently he sent a copy of the Sub-Registrar's letter and of the complaint to the Police Inspector at Erode, who on the 4th or 5th ordered the case to be registered for investigation. In the meantime, Kanni Moopan, in compliance with the advice given him on the 2nd, had lodged a complaint before the Sub-divisional Magistrate, Erode, who proceeded to dismiss it summarily, mainly on the surprising ground that the complainant knew nothing about the contents of the sale-deed in question. As his complaint was that he had not signed the deed and that someone had personated him before the Sub-Registrar, his ignorance of its contents was nothing more than was to be expected. On the 22nd the police put in their charge-sheet, which was taken on file by the Sub-Magistrate of Perundurai. In May, the case was adjourned at the request of the petitioners on the allegation that they were going to move the High Court for a transfer. On 15th May they informed the Court that they had so moved. That was untrue. What they had done was to move the High Court to quash the proceedings on the ground that the Sub-Magistrate had no jurisdiction to entertain the charge-sheet, the Sub-divisional Magistrate's order dismissing Kanni Moopan's complaint not having been set aside. Jackson, J., referred the application to a Bench, which in its turn, referred it to a Full Bench for decision of the following question :

Whether, a complaint having been dismissed by a Sub-divisional Magistrate under S. 203, Criminal P.C., a Sub-Magistrate has jurisdiction to entertain a charge sheet founded on a subsequent complaint, the order of dismissal not having been set aside.

The leading case on the point, as far as this Court is concerned, is *Emperor v.*

(1) [1906] 29 *Mad.* 126 = 16 *M. L. J.* 79 = 3 *Cr. L. J.* 274 (F.B.).

(2) [1905] 28 *Mad.* 255 = 2 *Weir* 247 = 2 *Cr. L. J.* 752.

(3) [1897] 24 *Cal.* 528 = 1 *C. W. N.* 370.

(4) [1899] 22 *All.* 106 = (1899) *A. W. N.* 211.

Chinna Kaliyappa Goundan (1). That was, of course, a case in which a dismissed complaint was re-entertained by the same Magistrate as had dismissed it and the majority of the Full Bench held that he had jurisdiction to do so. It had previously been decided in *Mahomed Abdul Mennan v. Panduranga Rao* (2), that a Magistrate had no power to entertain a complaint that had already been dismissed by another Magistrate of co-ordinate jurisdiction. In the case we are now considering the prior dismissal was by a Magistrate of superior jurisdiction, but that, in our opinion, makes no difference in principle, apart from the fact that, as far as the subject-matter of the particular complaint was concerned, their jurisdiction was co-ordinate. A very considerable number of rulings has been cited before us, to most of which we consider it unnecessary to refer. What, in effect, Mr. Jayarama Ayyar has pressed before us is to say that the *Emperor v. Chinna* (1) was wrongly decided. We see no reason to do anything of the sort. It is curious, no doubt, that the Code, while empowering superior Courts to direct further inquiry into complaints that have been dismissed under S. 203 which would seem to supply a complete and adequate remedy against improper dismissal should at the same time, allow a complainant and a Magistrate to dispense with that formality and permit the one to present and the other to entertain a complaint on the same facts as a complaint that has already been presented and dismissed. But that is not our concern. We have to interpret the Code as it stands and not in the light of any anomaly to which its wording may give rise. Something has been sought to be made out of the difference between S. 147 of the Code of 1872 and S. 403 of the present Code. As to that, we are of opinion that the difference is one merely of language and not of substance. S. 147 of the old Code provided that "the dismissal of a complaint shall not prevent subsequent proceedings." There is no similar provision in the present Code and it is argued that the absence of such a provision leads to the inference that the dismissal of a complaint is now a bar to further proceedings until it is set aside. That is not, in our opinion, the proper inference from the language of S. 403. The section begins by laying down that a man who

has been tried for an offence and convicted or acquitted of it shall not be liable to be tried again for the same offence and it ends with the explanation that the dismissal of a complaint is not an acquittal for the purposes of the section. That however is not all; there is in regard to an acquittal a qualification which is not to be found in the explanation. It is that an acquittal to be a bar to a second trial must still remain in force. In regard to the dismissal of a complaint it is not stated that the order of dismissal is a bar until it is set aside. The only meaning we can put on the wording of the explanation is that an order dismissing a complaint is not an acquittal, in the sense that it bars a further inquiry until it has been set aside. That being so, we must follow the ruling in *Emperor v. Chinna* (1), which, in our opinion, really covers the present case. There is, it seems to us, no difference in principle between the entertainment of a second complaint by the same or by a different Magistrate. That was pointed out by Sir Francis Maclean in *Queen-Empress v. Dolegobind Das* (5), whose opinion was approved by Phillips, J., in *P. Subba Reddi v. C. Kamal Saib* (6).

P.R.S /K.N. Order accordingly.

(5) [1901] 28 Cal. 211=5 C. W. N. 169.

(6) 7 Cr. L. R. 255.

A. I. R. 1932 Madras 371

JACKSON, J.

(Konda) Satyavatamma—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Case No. 730 of 1930, and Criminal Revn. Petn. No. 681 of 1930, Decided on 10th February 1931, against judgment of Sub-divisional Magistrate, Guntur, D/- 23rd September 1930, in Criminal Appeal No. 23 of 1930.

(a) Criminal P. C. (1898), S. 439 — Points not raised in trial.

A point not raised at the time of trial should not be allowed to be raised in revision.

(b) Penal Code (1860), S. 117—S. 117 is not superseded by Madras Salt Act (1899), S. 74.

Section 74, Madras Salt Act, does not supersede the provisions of S. 117 of the Penal Code. S. 74, Salt Act, refers to the direct abetment of particular acts and to try and make it embrace the offence under S. 117, Penal Code, is merely legal quibble. Hence a person instigating more than ten persons to commit offence under salt law is liable for three years' imprisonment under S. 117, Penal Code and not to six month's